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Supreme Court of the United States

OCTOBER TERM, 1967

No. 515

W. E. B. DUBOIS CLUBS OF AMERICA; BROOKLYN DUBOIS CLUB; CHICAGO WESTSIDE DUBOIS CLUB; SAN FRANCISCO CITYWIDE DUBOIS CLUB; HUGH FOWLER; TERENCE HALLINAN; JOSE RISTORICCI; DONNA ALLEN; REV. JAMES BEVEL; REV. WILLIAM S. COFFIN; DAVE DELLINGER; RALPH DI GIA; FRANK EMSPAK; PROF. ROBERT J. HAVIGHURST; PROF. STAUGHTON LYND; JOHN LEWIS; CARL OGLESBY; REV. JOSEPH SITTLER; ELIZABETH SUTHERLAND; NORMAN THOMAS; DAGMAR WILSON,

Plaintiffs-Appellants,

—against—

RAMSEY CLARK, Attorney General of the United States; JOHN M. MAHAN, Chairman, and JOHN S. PATTERSON, SIMON MCHUGH, LEONARD L. SELLS and EDWARD C. SWEENEY, all members of the Subversive Activities Control Board,

Defendants-Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

W. E. B. DUBOIS CLUBS OF AMERICA, etc. *et al.*,

Plaintiffs-Appellants,

—against—

RAMSEY CLARK, etc. *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

A. *The Opinions Below*

The *per curiam* opinion of the statutory three-judge United States District Court for the District of Columbia, which has not yet been officially reported, is set forth in full as Appendix A to this statement.

B. *Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked*

1. This is an appeal from a *per curiam* opinion and order of a three-judge Federal District Court convened pursuant to Title 28 U. S. C. §§2282 and 2284. The appellants instituted an action on April 26, 1966, challenging the constitutionality of and seeking an injunction restrain-

ing the enforcement of the Subversive Activities Control Act of 1950 (hereinafter sometimes referred to as the Act)[1] and in particular §7(b), (c) and (d) thereof[2] (hereinafter sometimes referred to as the Communist-front provisions), and seeking equitable and declaratory relief to protect federally guaranteed constitutional rights. Jurisdiction of the court below was based on Title 11, §521, D. C. Code, Title 28 U. S. C. §§2201 and 2282.

A three-judge district court was thereupon duly appointed by the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit.[3] On April 18, 1967, the Court rendered a written opinion granting appellees' motion to dismiss the complaint (Appendix A).

The order of the three-judge Court dismissing the complaint was duly entered on May 5, 1967. On June 12, 1967, it unanimously granted a motion by appellants for an order staying further proceedings by the Subversive Activities Control Board (hereinafter sometimes referred to as the SACB) against appellant the W. E. B. DuBois Clubs of America (hereinafter sometimes referred to as the DuBois Clubs) pending the disposition of this appeal. A Notice of Appeal was duly filed on June 5, 1967. On July 28, 1967, Associate Justice Byron R. White granted a motion by appellants to extend their time in which to file this jurisdictional statement until August 18, 1967.

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[1] 64 Stat. 987-1005, 50 U. S. C. 781-98.

[2] 50 U. S. C. 786(b), (c) and (d).

[3] In granting appellants' motion for an order certifying the necessity of convening a three-judge Court, District Judge William B. Bryant concluded "that the constitutional question raised by the plaintiffs is not patently frivolous." At the same time, he denied appellees' motion to dismiss the complaint.

2. Jurisdiction of this appeal is conferred on this Court by Title 28 U. S. C. 1253.

3. Cases sustaining the jurisdiction of this Court are: *Stafford* v. *Wallace*, 258 U. S. 495; *Coleman* v. *McGrath*, 342 U. S. 580; *Dombrowski* v. *Pfister*, 380 U. S. 479.

4. The validity of §7(b), (c) and (d) of the Subversive Activities Control Act of 1950, as amended, is here involved. The text of this Act of Congress is as follows:

Sec. 7. • • •

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(c) The registration required by subsection (a) or (b) shall be made—

(1) in the case of an organization which is a Communist-action organization or a Communist-front organization on the date of the enactment of this title, within thirty days after such date;

(2) in the case of an organization becoming a Communist-action organization or a Communist-front organization after the date of the enactment of this title, within thirty days after such organization becomes a Communist-action organization or a Communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such regis- at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

C. ***Questions Presented by This Appeal***

1. Whether the provisions of the Subversive Activities Control Act of 1950, 50 U. S. Code §§781ff, relating to the registration of alleged Communist-front organizations are unconstitutional on their face because they conflict with Article I, §9, Clause 3, Article III, and the First, Fifth, Sixth, Ninth and Tenth Amendments of the Constitution of the United States?

2. Whether the provisions of the Subversive Activities Control Act of 1950, 50 U. S. Code §§781ff, relating to the registration of alleged Communist-front organizations are unconstitutional as applied to appellants because, as applied, they conflict with Article I, §9, Clause 3, Article III, and the First, Fifth, Sixth, Ninth and Tenth Amendments of the Constitution of the United States?

3. Whether the complaint herein states a cause of action for equitable relief restraining the enforcement of these unconstitutional provisions prior to the exhaustion of administrative proceedings where the statute on its face and as applied and the administrative proceedings themselves create a chilling effect upon the exercise of First Amendment rights under the principles established in *Dombrowski* v. *Pfister*, 380 U. S. 479.

4. Whether the complaint herein states a cause of action for a judgment declaring the unconstitutionality of the aforesaid provisions prior to the exhaustion of administrative proceedings where the statute on its face and as here applied and the administrative proceedings themselves create a chilling effect upon the exercise of First Amendment rights under the principles established in *Dombrowski* v. *Pfister,* 380 U. S. 479.

5. Whether the District Court erred in dismissing the complaint on the ground that plaintiffs-appellants are required to exhaust their administrative remedies.

D. *Statement of the Facts of the Case*

Appellant DuBois Clubs is an unincorporated membership association of young American men and women of all races and religious beliefs, between the ages of fourteen and thirty-five, the majority of whom are of college age. Formed in San Francisco, California, in June of 1964, it was named after Dr. W. E. B. DuBois, the famous Negro humanitarian and scholar who was instrumental in the founding of the National Association for the Advancement of Colored People. Its national office and main place of business is now located in Chicago, Illinois. Appellant Hugh Fowler, its National Chairman in March of 1965, is presently a member.[4]

[4] Appellant Terence Hallinan, the DuBois Clubs national secretary in March of 1965, is presently a member; appellant Jose Ristoricci was then, and still is, its New York and East Coast Coordinator. Appellants Brooklyn DuBois Club, Chicago West Side DuBois Club and San Francisco Citywide DuBois Club are three of its local chartered affiliates. The remaining appellants are fourteen American citizens wholly unconnected with the DuBois Clubs or any of its local affiliates but whose First Amendment rights were adversely affected by the events hereinafter set forth.

The primary objective of the DuBois Clubs is to contribute toward the building of a society whose material benefits are available on the basis of need, not privilege, where every person will have a voice in government without regard to race, creed, religion or economic status, where education for all is encouraged and paid for by the government, where no one who wants to work is idle and where people can plan their future free of the threat of war. The DuBois Clubs believe and advocate that these results may best be achieved through a socialist form of society. The DuBois Clubs are independent of any parent organization and are free from political obligations to any political party in this country or abroad. The policy of the DuBois Clubs is that membership is open to every young person who shares its goals, regardless of political point of view, race, creed or color.

The DuBois Clubs are dedicated to the defense and preservation of the fundamental liberties and freedoms of the American people as embodied in the Constitution of the United States and, in particular, in the Bill of Rights. Among these things, they are striving for (a) racial freedom and equality throughout the United States; (b) the termination of the present war in South Viet Nam; (c) an end to economic deprivation among large sectors of the American community, and (d) the creation of jobs and job training opportunities. To these ends, they seek to utilize to the fullest extent the fundamental democratic liberties of freedom of speech, freedom of press, freedom of association and the right peaceably to assemble and petition the Government for redress of grievances, all of which are guaranteed by the First Amendment to the Constitution of the United States.

The DuBois Clubs are a self-governing, wholly independent association of young Americans. All policies, programs and other decisions are made solely by the membership of the DuBois Clubs in accordance with democratic procedures. The highest governing body is the national convention. In the interim between conventions the highest policy making body is the national committee of the DuBois Clubs. Individual clubs are organized in local communities throughout the nation. These local clubs conduct activities in their local communities consistent with the national program and objectives of the DuBois Clubs as set forth herein, as well as in response to the social, cultural, economic and political needs of the young people in the communities in which they exist.[8]

On March 4, 1966, the Attorney General caused to be filed with appellee SACB members a petition (hereinafter sometimes referred to as the Attorney General's petition) seeking to force the DuBois Clubs to submit to punitive registration as a "Communist-front organization" pursuant to §§7(b), (c) and (d) of the Act, *supra*. The petition alleged that the DuBois Clubs was dominated and controlled by the Communist Party. It further alleged that it had engaged in various activities such as protest marches, picket lines, publication and distribution of leaflets and other literature and had adopted views which, according to the Attorney General, were similar to positions adopted by the Communist Party on such questions as the cessation of nuclear testing, opposition to colonial and neo-colonial exploitation, institution of diplomatic relations with the

[8] The foregoing elaboration of the organization and objectives of the DuBois Clubs and its local chartered affiliates is extracted from the complaint herein.

Peoples Republic of China and with Cuba, the admission of China to the United Nations, the removal of the U. S. Naval Base from Guantanamo, and the lifting of travel bans to Cuba, China and North Viet Nam (Appendix B, *infra*, pp. 10a-11a).[6] There is no question that the activities charged by the Attorney General to the DuBois Clubs are all activities protected by the First Amendment since they all involve acts of speech, assembly and press.

At the same time, the Attorney General issued an inflammatory and provocative press statement which announced the filing of said petition and stated that this action had been the result of "extensive FBI investigation". The DuBois Clubs was described as "a Marxist youth organization created and controlled by the Communist Party, U. S. A. [with] . . . a substantial number of the group's officers . . . are members of the Communist Party and 'subject to its discipline' ".

This press statement resulted in widespread newspaper, radio and television publicity throughout the United States. The day after its release, bombs totally destroyed the national headquarters of the DuBois Clubs, then located in San Francisco, California. Hours later, members of the Brooklyn DuBois Club, who had peacefully assembled in their headquarters in New York City to protest the filing of the petition and the provocative nature of its accompanying press statement were attacked and beaten by persons whose identity was not known to them.

Since the filing of the Attorney General's petition, DuBois Clubs has undergone further physical attacks,

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[6] Significantly, the major current DuBois Clubs activity, opposition to American military involvement in South Viet Nam, was not included in the Attorney General's enumeration of its views.

extensive harassment and continuous adverse publicity. For example, on July 28, 1966, its national office in Chicago, Illinois, was broken into and its key financial and membership records stolen. Many colleges and universities have refused to permit its local chartered affiliates to be organized or to function on their campuses or made it extremely difficult and/or onerous for them to do so.

The petition also resulted in the marked curtailment of the activities of the DuBois Clubs since large numbers of individuals otherwise disposed to participate in or to contribute to the Clubs have refused to do so because of the pending action before the SACB.

Eight weeks after the filing of the Attorney General's petition, appellants turned to the federal courts for protection against this serious and imminent threat to their fundamental constitutional rights. They sought, *inter alia*, permanent and interlocutory injunctive relief restraining the enforcement of the Communist-front provisions of the Act as unconstitutional on their face and as applied. In due course, a three-judge District Court was convened, after which appellants moved for a temporary injunction and appellees for an order dismissing the complaint for failure to state a cause of action.

On January 21, 1967, the three-judge court heard argument addressed solely to the question of the facial constitutionality of the Communist-front provisions. On April 18, 1967, it announced that it declined to act on the constitutional issues presented, under the conclusion that the complaint failed to state a cause of action for relief. In so doing, it held that appellant DuBois Clubs was required to undergo the administrative proceedings provided in the

Act[7] before seeking federal judicial intervention (Appendix A, *infra*, pp. 3a-4a).

Following the convening of the statutory three-judge court, appellees SACB members agreed to adjourn all administrative proceedings pending the hearing and determination of the cause by that tribunal. This agreement remained in effect until the decision sought to be reviewed. When the SACB thereupon scheduled administrative hearings, appellants applied to the court below for an order staying them. The requested stay was unanimously granted on June 12, 1967.[8]

The complaint charged and appellants were prepared to prove by affidavits[9] and oral testimony that the threatened enforcement of the Communist-front provisions of the Act was for the sole purpose of discouraging and preventing appellants from exercising rights, privileges and immunities secured to them by the Constitution, and in particular, freedom of speech, assembly, press and association and the right to petition for redress of grievances. That

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[7] 50 U. S. C. 792.

[8] On June 15, 1967, the SACB, in view of the stay granted by the court below, issued an order vacating "the date of June 20, 1967, for beginning the hearings herein" and further ordered "that all further proceedings herein are postponed until further order of the Board."

[9] On August 12, 1966, appellants moved the three-judge Court for an interlocutory injunction. This motion was accompanied by many affidavits from officers of national civil rights and peace organizations attesting to the "chilling effect" of defendants' actions as well as those from DuBois Clubs officers and members indicating the immediate adverse consequences thereof on their own organizational activities. In view of the dismissal of the complaint by the court below, this motion was never acted upon.

appellees had virtually no hope of ultimate success is best illustrated by the Attorney General's frank admission, a month after the filing of the petition, that "one of the major purposes of the act" was to destroy affected organizations before administrative proceedings began.[10]

E. *The Questions Presented Are Serious and Substantial*

1. The Court below incorrectly held that appellant, DuBois Clubs, was required to exhaust its administrative remedies.

a. Should the opinion of the court below be sustained, a statute that "is a bill of attainder; that . . . imposes cruel, unusual and savage punishments for thought, speech, writing, petition and assembly; and that . . . stigmatizes people for their beliefs, associations and views about politics, law and government,"[11] will be beyond the remedial reach of federal district courts until affected organizations undergo the irreparable injury engendered by sustained administrative hearings and lengthy appellate review.[12] To force appellants to join the sorry ranks of the many organizations

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[10] *The Daily Princetonian*, April 6, 1966, pp. 1, 3, which, together with the Attorney General's press release referred to at p. 10 *infra*, was attached to appellees' motion below to dismiss the complaint.

[11] Dissenting opinion, Mr. Justice Black, *American Committee for Protection of Foreign Born* v. *SACB*, *Veterans of the Abraham Lincoln Brigade* v. *SACB*, 380 U. S. 503, 511.

[12] "But the allegations in this complaint depict a situation in which defense of the state's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965).

which, in the words of former Attorney General Nicholas De B. Katzenbach, "have collapsed" shortly after the initiation of SACB proceedings,[13] would be to abdicate the federal judicial responsibility so forcefully advanced by this Court only two terms ago in *Dombrowski* v. *Pfister*, 380 U. S. 473.

The court below, despite its candid recognition that "[T]he initiation of proceedings to require an organization to register under the Act may well present some practical problems in the area of free expression,[14] nevertheless refused to interfere with their commencement. By so doing, it eliminated any effective judicial forum for the meaningful resolution of what this Court itself has referred to as viable and important constitutional questions.[15]

The gravity of the questions posed by the lower court's renunciation of federal judicial *responsibility* as set forth in *Dombrowski* is underscored by its own acknowledgment of the "practical problems in the area of free expression,"[16] caused by the very initiation of SACB proceedings. As this Court observed in *Dombrowski*, "[T]he chilling effect upon the exercise of First Amendment rights may derive from

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[13] *The Daily Princetonian*, April 6, 1966, pp. 1, 3. "He [Mr. Katzenbach] indicated that most groups petitioned became defunct before any action could be taken."

[14] Appendix A, *infra*, p. 3a.

[15] *American Committee* v. *SACB*, *supra*, at 505. See also Mr. Justice Douglas' characterization of "important constitutional questions", in which he was joined by Associate Justices Black and Harlan (*ibid.* at 506), and identical language used by Mr. Justice Black (*ibid.* at 511). See also *The Registration of Communist Front Organizations; The Statutory Framework and The Constitutional Issues* (Note) 113 U. of Pa. L. Rev. 1270 (1965).

[16] Appendix A, *infra*, p. 3a.

the fact of the prosecution, unaffected by the prospects of its success or failure."[17] The fact that "Congress has made careful provision that no tangible sanctions can come into play until the facts have been explored in open hearing and the courts have scrutinized what they show. . . ."[18] is of small comfort to an organization destroyed long before this arduous route reaches its bootless destination.

b. The court below, in a judicial *tour de force*, came to the wholly untenable conclusion that this Court's decisions in *American Committee* and *Abraham Lincoln Brigade* "on the same day it decided *Dombrowski*"[19] justified the denial of judicial relief to appellants at this stage. Totally disregarding the crucial distinguishing fact that *American Committee* and *Abraham Lincoln Brigade* reached this Court "under the statutory review provided by Congress for registration orders entered by the Board after hearing,"[20] while *Dombrowski* arose, as did the instant litigation, before the institution of punitive procedures,[21] the court below erroneously assumed that remanding the earlier cases to SACB for fresh hearings constituted a fiat that SACB administrative procedures, no matter how demonstrably "chilling" their effect on First Amendment rights,

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[17] 380 U. S. at 487.

[18] Appendix A, *infra*, pp. 3a-4a.

[19] Appendix A, *infra*, p. 2a.

[20] Appendix A, *infra*, pp. 2a-3a.

[21] Although the court recognized, for its own purposes, "the patent differences between the two situations" (Appendix A, *infra*, p. 3), it pointedly ignored the fact that *American Committee* and *Abraham Lincoln Brigade* represented attempts to obtain a decent funeral for First Amendment rights while the purpose of *Dombrowski* was to prevent their death.

are beyond the reach of federal courts until after they have been completed.[22]

Not only does this conclusion fly squarely in the face of all logic, but it is in sharp conflict with the recent rulings of this Court in this area. In this connection, see *Dombrowski* v. *Pfister, supra; Greenwood* v. *Peaccock*, 384 U. S. 808, 829.[23] As this Court has often so clearly recognized,[24] most recently in *Keyishian* v. *Board of Regents*, 385 U. S. 589, "The threat of sanctions may deter . . . almost as potently as the actual application of sanctions." Moreover, the decision below completely ignores this Court's own determination that "our Communist Party decision on the Communist-action provisions did not necessarily foreclose petitioner's constitutional questions bearing on the Communist-front provisions." *American Committee* v. *SACB, supra*, at 505.

In essence, the court below is substituting for the abstention doctrine advanced by the *Dombrowski* district court

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[22] Parenthetically, the court below refused to act where only the enjoining of a federal agency was concerned while this Court in *Dombrowski*, in the face of the infinitely more delicate state-federal relationship partially symbolized by 28 U. S. C. 2283, ordered the district court promptly to frame "a decree restraining prosecution of the pending indictments against the individual appellants. . . ." 380 U. S. at 467.

[23] For cases in the lower court which have granted relief in this area without requiring exhaustion of remedies see *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519, 522; *Carmichael* v. *Allen*, 267 F. Supp. 985, 993; *Stamler* v. *Willis*, 271 F. 2d 413; and *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817. Significantly, in neither of the latter two cases, both recent examples of the vitality of the *Dombrowski* concept, did the government seek certiorari from adverse rulings.

[24] *NAACP* v. *Button*, 371 U. S. 415, 433; *Dombrowski* v. *Pfister, supra*, at 486; *Baggett* v. *Bullitt*, 377 U. S. 360, 379.

what it considers a workable equivalent—the exhaustion of administrative remedies. Despite its own expressed misgivings and Mr. Katzenbach's concession that "most groups petitioned become defunct or dissolved before action could be taken," [26] it proclaims that "Congress has made careful provisions that *no tangible sanctions* can come into play until the facts have been explored in open hearing and the courts have scrutinized what they show, both in their adequacy to support a registration order and in their constitutional impact upon the statute itself." (Emphasis added.)[26]

Surely, the applicability of *Dombroswki* cannot depend on the semantics of exhaustion—administrative proceeding any more than it can rest upon those of abstention—criminal prosecution. If this Court has not, in the area of constitutionally protected expression, "required that all of those subject to overbroad regulations risk prosecution to test their rights," [27] *a fortiori,* it cannot compel those who face comparable dangers through punitive administrative proceedings to suffer the "substantial loss or impairment" [28] required by being subjected to them. For, as this Court has so sharply and powerfully enunciated in *Dombrowski,* "free

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[25] *The Daily Princetonian, supra,* p. 3.

[26] Appendix A, *infra,* pp. 3a-4a.
The court's careful use of the adjective *tangible* underscores its own realization of the adverse effect of the very administrative procedure with its omnipresent "threat of sanctions," *NAACP* v. *Button, supra,* which it makes a condition precedent of judicial responsibility.

[27] 380 U. S. at 486; *Keyishian* v. *University of New York, supra; Speiser* v. *Randall,* 357 U. S. 513.

[28] 380 U. S. at 486.

expression—of transcendent value to all society, and not merely to those exercising their rights—must be the loser." [29]

In blunt terms, the effect of the ruling below is to require the DuBois Clubs to endure a lengthy, expensive and extremely damaging hearing before the SACB before it may obtain any judicial consideration of its contention that the Act which so openly inhibits the exercise of First Amendment freedoms is invalid on its face. But as shown by the complaint, the affidavits, and by sad experience with the Communist-front provisions, affected organizations are destroyed by the very nature of the accusations and the proceedings.[30] As former Attorney General Katzenbach himself has pointed out, with rare exceptions, most of the affected organizations have been destroyed by the procedures, even in the absence of a final order.[31] Obviously, an administrative remedy which itself destroys the litigant is no remedy at all. If the statute is unconstitutional on its face, the DuBois Clubs should be permitted to obtain a court adjudication to that effect before and not after it

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[29] 380 U. S. at 486.

[30] Professor Chafee prophetically stated:

> "Just by filing a petition against any enterprise he [the Attorney General] dislikes, he can put it under a black cloud which will scare off contributions and force it to interrupt its normal activities in order to defend itself for months before the Board at the cost of thousands of dollars. This is enough to wreck almost any group even though it eventually escapes registration." The Blessings of Liberty (Lippincott & Co., Phila., 1956), at p. 155. See also The Registration of Communist-Front Organizations, *supra*, at 1289.

[31] "But, I suppose, in part, that [the destruction of affected organizations] was one of the major purposes of the Act." *The Daily Princetonian*, *supra*, at p. 3.

is destroyed or hopelessly crippled by protracted SACB proceedings. The position of the court below would in effect deny any court review now or ever, since the likelihood is that the DuBois Clubs, like so many other such organizations, will not survive them.

Indeed, even the court below recognized the serious and substantial nature of this problem. Accordingly, although it resolved the constitutional issue against appellants, it nevertheless unanimously stayed further proceedings before the Board, so as to permit the DuBois Clubs to present its contentions to this Court without going through the exhaustive Board hearings.

There are additional compelling reasons why this Court should now consider appellants' claim of facial unconstitutionality without requiring the DuBois Clubs to exhaust its administrative remedies. In the first place, on March 3, 1967, the Court of Appeals for the District of Columbia Circuit decided *Communist Party* v. *United States*, —— F. 2d ——, in which it held that the Communist Party cannot constitutionally be required to register in accordance with the order of the SACB.[32] It is, therefore, clear that if a registration order were in fact entered against the DuBois Clubs by the SACB it would not have to comply therewith and the order could not be enforced. In short, the proceeding against the DuBois Clubs would be a futility and would at the same time interfere with the exercise of its most fundamental rights. Under the circumstances, it should not be required to go through this futile

[32] The government did not petition to this Court for certiorari, thus acknowledging the correctness of the decision.

and destructive proceeding before being permitted to obtain an adjudication of its constitutional contentions.

Secondly, as a result of the decision of the Court of Appeals in the *Communist Party* case, *supra*, it is now beyond cavil that the Act is a bill of attainder against the DuBois Clubs or any other alleged Communist-front organization. When this Court sustained a registration order against the *Communist Party* v. *SACB*, 367 U. S. 1, it held that the order did not attaint the Party on the following grounds:

> "If the Party should at any time choose to abandon these activities, after it is once registered pursuant to §7, the Act provides adequate means of relief. As often as once a year it may apply to the Attorney General for cancellation of registration, and, in the event of his refusal to remove it from the register and to relieve it from the duty of filing annual statements, it may petition the Board for a redetermination of its amenability to the registration requirements of the Act, pursuant to a hearing, which, again, is subject to judicial review. §§13(b), (i), (j), (14a). Far from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn upon continuingly contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of a described character" (at 87).

However, in *Jefferson School* v. *SACB*, 331 F. 2d 76, the Court of Appeals for the District of Columbia Circuit held that an organization accused of being a Communist-front may not litigate the issue of whether the Communist Party

is a Communist-action organization. Juxtaposing the *Communist Party* and the *Jefferson School* cases, it follows that a Communist-front organization is attainted by a registration order unless the Communist Party can, under the Act, relitigate its status on the ground that it has abandoned the activities which occasioned the order. But the redetermination provisions of the Act are available to the Party only if it has registered.[33]

It is now apparent that the Party has not registered, will not register and cannot constitutionally be forced to register. The only way in which the Party can take advantage of the redetermination section is after it surrenders its constitutional right not to register. Since neither the Communist Party nor any alleged Communist-front organization can litigate the current status of the Communist Party, the Act does apply "to the past and ineradicable actions of an organization" and the Act is therefore a bill of attainder against appellant DuBois Clubs.

Lastly, this Court upheld the constitutionality of the Communist-action provisions in *Communist Party* v. *SACB, supra*, on the basis of a Congressional finding made in Sec. 2 of the Internal Security Act concerning the nature of the world Communist movement. It recognized, however (at 113), that changed circumstances would require a different result. Whatever might have been the prevailing view concerning the findings of Sec. 2 when Congress made

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[33] Sec. 13(b) of the Act, 50 U. S. Code §792(b), referred to in the quotation from the *Communist Party* case in this Court, *supra*, provides that "Any organization *registered* [under the Act] . . . may . . . make application to the Attorney General for the cancellation of such registration. . . ." (Emphasis supplied.)

them in 1950,[34] its description of the world Communist movement is plainly anachronistic today. Statesmen and scholars alike recognize that the 1950 Congressional view of Communism as a monolithic world movement under iron Soviet discipline and control and dedicated to overthrow all free governments by criminal and conspiratorial means, has no resemblance to contemporary reality.[35]

All of these well-informed persons have recognized what is a matter of common knowledge and a proper subject for official or judicial notice, i.e., that there is no longer a monolithic world Communist movement, and that on the contrary, there are wide and substantial schisms between the Communist countries. Since the constitutionality of the Act is predicated upon a statement of facts which no longer exists, the statute cannot now be upheld. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153.

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[34] "Sec. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the would through the medium of a world-wide Communist organization."

[35] See, *e.g.*, Kennan, *Polycentrism and Western Policy*, Foreign Affairs, Jan. 1964, pp. 172, 174; Sen. Fulbright, *Foreign Policy, Old Myths and New Realities*, 110 Cong. Rec. 6227, 6228; Vice-President (then Sen. Humphrey) as quoted in the *Washington Evening Star*, Sept. 3, 1964; Sec. of State Rusk in a speech before the IUE-AFL-CIO, reported in the *Congressional Quarterly*, March 6, 1964, p. 479 and in an address to the New York Council on Foreign Relations, *New York Times*, May 25, 1966; Defense Sec. McNamara and Under-Secretary of State Katzenbach, as quoted in the *Washington Post*, Jan. 27, 1967, at p. A-7; Toynbee, *We Must Woo Red China, Saturday Evening Post*, July 17, 1965, at p. 10.

Obviously in view of all of these factors, appellant Du-Bois Clubs should not be required, as a prerequisite to having its eventual day in court, to undergo a long and arduous hearing before the SACB under this patently unconstitutional statute which may well result in the destruction of the organization and will, as a minimum, seriously impair the exercise by it and its members of transcendent First Amendment rights.

2. The federal statutes here challenged are violative of the Constitution of the United States on their face.

a. The statutes here under challenge are so broad in their sweep, so vague and nebulous in their definitions and characterizations of affected organizations and activities that they fail to meet the most minimal standards of the First and Fifth Amendments. *Wright* v. *Georgia,* 373 U. S. 284; *NAACP* v. *Button,* 371 U. S. 415; *Smith* v. *California,* 361 U. S. 147; *Winters* v. *New York,* 333 U. S. 507; *Herndon* v. *Lowery,* 301 U. S. 242; *Stromberg* v. *California,* 283 U. S. 359; *United States* v. *C. I. O.,* 335 U. S. 106; *Dombrowski* v. *Pfister, supra; Keyishian* v. *Board of Regents, supra; Baggett* v. *Bullitt,* 377 U. S. 360; and *Elfbrandt* v. *Russell,* 384 U. S. 11. Their sweeping command conflicts sharply with the fundamental guarantees of free speech, assembly, association and the right to petition for a redress of grievances. *Gibson* v. *Florida Committee,* 372 U. S. 539; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278.

"This freedom-crushing law," as Mr. Justice Black has characterized it,[36] makes it possible for the SACB to de-

[36] 380 U. S. at 512.

termine whether any organization is a "Communist-front organization" by, *inter alia*, "the extent to which the position taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-actionist organization, Communist foreign government, or the world Communist movement. . . ." [37] This is precisely why former President Truman, in his veto message of September 22, 1950, referred to the Communist-front provisions as "the greatest danger to freedom of speech, press and assembly since the alien and sedition laws of 1798." [38]

Other sections of the statutes lend themselves to much the same analysis. Under Section 3(4), for example, an organization may be designated as a Communist-front if it is "primarily" operated for the purpose of giving aid and support to the Communist Party. Statutes containing equivalent language were invalidated by this Court in *Cramp* v. *Board of Public Instruction, supra,* and *Baggett* v. *Bullitt, supra.*

It would serve no useful purpose to point to other striking examples of the over-breadth of language of the chal-

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[37] 50 U. S. C. 792(f)(4). This definition is, of course, incorporated by necessity in the Communist-front provisions of the Act. Its application to the DuBois Clubs by the Attorney General is apparent in his attempt to dovetail the organization's alleged views with those purportedly held by the Communist Party (Appendix B, *infra,* pp. 10a-11a).

[38] H. R. Doc. No. 708, 81st Cong., 2d Sess., p. 6.
Mr. Katzenbach quite obviously shares Mr. Truman's low opinion of the Act. "It was an act that President Truman vetoed at the time it was passed, and I thought the veto was justified at the time that he did it. I don't know anything that's happened to make me change my mind about the act. *Of course, as long as it's on the books, it has to be enforced like any other law." The Daily Princetonian, supra* (emphasis added).

lenged statutes. In *Dombrowski* v. *Pfister, supra,* this Court disposed of similar Communist-front registration requirements as unconstitutional on their face.[39] While the designation standards under the invalidated Louisiana statutes[40] may vary from those here involved, that variance is in degree only.

b. The "Communist-front provisions of the Act further violate the constant insistence of this Court that where First Amendment rights are concerned, even though governmental design be legitimate and substantial, that purpose may not be pursued by means that broadly stifle personal liberties when the end may be more narrowly achieved. *Shelton* v. *Tucker,* 364 U. S. 479; *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Talley* v. *California,* 362 U. S. 50.

A registration order issued under the Act's Communist-front provisions adversely affects the interest in organizational associations which is protected by the First Amendment. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516; *Communist Party* v. *SACB,* 367 U. S. 1, 90-91. Moreover, since these provisions condition the exercise of First Amendment rights on compliance with the statutory registration requirement, they squarely conflict with the First Amendment in this respect. *Thomas* v. *Collins,* 323 U. S. 516; *Lamont* v. *Postmaster General,* 381 U. S. 301.

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[39] 380 U. S. at 495-6.

[40] The Subversive Activities and Communist Control Law, La. Rev. Stat. §14:364(7).

The contention that this inhibition on the exercise of First Amendment rights may be justified on the ground that a Communist-front organization is substantially controlled by the Communist Party has no merit. The government lacks power to suppress the peaceable exercise of First Amendment rights by Communists as well as by everybody else. *DeJonge* v. *Oregon*, 299 U. S. 353; *Keyishian* v. *New York Board of Regents, supra.* Even statutes addressed to the advocacy of violence must be so limited as not to impair "legitimate political expression or association" of Communists. *Scales* v. *United States*, 367 U. S. 203, 229; *Elfbrandt* v. *Russell, supra.* Nor can the Act's destructive requirements be justified as a measure to disclose to the public who is "behind" an organization and its publications, since the First Amendment prevents the government from requiring the disclosure of the identity of those who write or distribute handbills. *Talley* v. *California, supra.*

It is obvious that the challenged "Communist-front" provisions are not statutes narrowly drawn to meet a specific problem, but, instead, are broadly drawn for the purpose of crippling the free exercise of First Amendment rights. As this Court reminded us in *Shelton* v. *Tucker, supra*, "the unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases."[41]

[41] 364 U. S. at 490.

CONCLUSION

This case urgently calls for the exercise of the appellate jurisdiction of this Court. The questions here presented are important not only to the appellants but far reaching in their impact upon decisive areas in our national life. The fundamental issue presented by this appeal—the determination of the invalidity of a law which Mr. Justice Black has characterized as "a wholesale denial of what I believe to be the constitutional heritage of every freedom-loving American" [42]—is the highest responsibility of the federal courts. Moreover, the relief sought by appellants, if it is to have any meaning whatsoever insofar as the DuBois Clubs is concerned, must be applied before the organization has, like its predecessors, been destroyed or hopelessly crippled. In essence, this is the lesson of *Dombrowski* and its progeny.

The decision below should be reversed, the complaint reinstated, and the relief prayed for granted.

Respectfully submitted,

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[42] Dissenting opinion, *American Committee* v. *SACB*, 380 U. S. at 512.

APPENDIX A

Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1087—66

W. E. B. DUBOIS CLUBS OF AMERICA, *et al.*,

Plaintiffs,

—v.—

NICHOLAS DEB. KATZENBACH, *et al.*,

Defendants.

Before:

PRETTYMAN, *Senior Circuit Judge,* and MCGOWAN, *Circuit Judge,* and BRYANT, *District Judge.*

PER CURIAM:

In March of 1966 the Attorney General of the United States petitioned the Subversive Activities Control Board for an order directing the W. E. B. DuBois Clubs of America to register as a Communist-front organization.[1] An

[1] The statute in question is the Subversive Activities Control Act of 1950, 64 Stat. 987-1005, 50 U. S. C. § 781-98 (1964). The particular provisions under attack are paragraphs (b), (c), and (d) of Section 7 of the Act, which provide for the registration of Communist-front organizations. 50 U. S. C. § 786.

answer was filed in which, among other things, the respondent DuBois Clubs (1) denied generally that it was a Communist-front organization within the meaning of the Act and (2) denied various allegations of fact made by the Attorney General in the petition. The Act contemplates that the issues so joined will be the subject of full evidentiary hearings; and that any registration order issued by the Board thereafter shall be subject to review in the first instance by the United States Court of Appeals for the District of Columbia Circuit, and ultimately by the United States Supreme Court on certiorari.

DuBois Clubs brought this suit in the District Court to dispense with the statutory procedure. It asks for a declaration that the registration provisions of the Act are unconstitutional; and it seeks injunctive relief against the Attorney General and the Board with respect to enforcement of them. After the convening of this three-judge court, the matter was heard on defendants' motion to dismiss the complaint for lack of subject-matter jurisdiction.

The issue raised by the motion is essentially whether this court should now determine the constitutionality of the challenged sections of the Act. At oral argument before us both sides appeared to be in agreement that a present holding of unconstitutionality was the premise of a denial of the motion, with subsequent proceedings in this court to be devoted only to evidence with respect to irreparable injury. DuBois Clubs' opposition to the motion relied heavily upon *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), where the Supreme Court held certain Louisiana subversive legislation invalid on its face and enjoined state criminal prosecutions under it.

On the same day it decided *Dombrowski*, however, the Supreme Court acted in the first two Communist-front cases

to reach it under the statutory review provided by Congress for registration orders entered by the Board after hearing. *American Committee* v. *SACB*, 380 U. S. 503 (1965); *Veterans of the Abraham Lincoln Brigade* v. *SACB*, 380 U. S. 513 (1965). The Court was there urged to declare the registration provisions unconstitutional; and the Court recognized the substantial nature of this claim in its cautionary comment that "[O]ur Communist Party decision on the Communist-action provisions did not necessarily foreclose petitioner's constitutional questions bearing on the Communist-front provisions. . . ." And see *Communist Party* v. *United States*, —— U. S. App. D. C. ——, —— F. 2d —— (decided March 3, 1967). The Court went on to say that, because of the staleness of the record made in the Board hearings, "decision of the serious constitutional questions raised by the order is neither necessary nor appropriate." It remanded the two cases to the Board for fresh hearings.

If the Supreme Court refused to decide the constitutional issues on a stale record, it would be anomalous for us to decide them on no record. The Supreme Court apparently saw nothing incongruous about reaching this result coincidentally with *Dombrowski;* and the patent differences between the two situations need no elaboration. The initiation of proceedings to require an organization to register under the Act may well present some practical problems in the area of free expression, but Congress has made careful provision that no tangible sanctions can come into play until the facts have been explored in open hearing and the courts have scrutinized what they show, both in their ade-

quacy to support a registration order and in their constitutional impact upon the statute itself.

The motion to dismiss is granted.

E. BARRETT PRETTYMAN
Senior Circuit Judge

CARL MCGOWAN
Circuit Judge

WILLIAM B. BRYANT
District Judge

APPENDIX B

Petition

IN THE

SUBVERSIVE ACTIVITIES CONTROL BOARD

Docket No. 126—66

NICHOLAS DEB. KATZENBACH, Attorney General of the United States,

Petitioner,

—v.—

W. E. B. DUBOIS CLUBS OF AMERICA,

Respondent.

On petition for an order requiring W. E. B. DuBois Clubs of America to register with the Attorney General, as required by Section 7(b), (c) and (d) of the Subversive Activities Control Act of 1950, as amended.

The Attorney General respectfully represents to the Subversive Activities Control Board that the W. E. B. DuBois Clubs of America was required under Section 7(b), (c) and (d) of the Subversive Activities Control Act of 1950, as amended, to register and file a registration statement with the Attorney General within thirty (30) days after its inception on or about June 21, 1964, as a Communist-front organization, and that it failed to do so and continues to fail to do so.

Pursuant to Section 13(a) of the Act, therefore, the Attorney General petitions this Board for an order, after

appropriate proceedings, directing the W. E. B. DuBois Clubs of America to register with the Attorney General as a Communist-front organization in the manner required by the Act.

In support of this petition, the Attorney General alleges the following facts, based on information and belief, relating to the character of the W. E. B. DuBois Clubs of America, as measured by the standards specified in the Act:

I.

From its inception on or about June 21, 1964, and continuing to the date of the filing of this petition, there has existed in the United States an unincorporated association known as the W. E. B. DuBois Clubs of America (hereinafter referred to as DCA or "organization"). This organization has its national office at 954 McAllister Street, San Francisco, California.

II.

Since 1919 there has been in continuous existence in the United States an organization known by various names, and which is now known as the Communist Party of the United States of America (hereinafter referred to as the Communist Party or Party). The Communist Party has been and is a Communist-action organization within the meaning of Section 3 of the Subversive Activities Control Act of 1950. The Board, after appropriate proceedings, found the Communist Party to be a Communist-action organization, and on April 20, 1953, ordered the Party to register as such with the Attorney General. The order became final on October 20, 1961, and notice of the fact that such order became final was published in the *Federal Register* on October 21, 1961, at page 9923.

III.

From its inception, DCA has been and is substantially directed, dominated and controlled by the Communist Party and has been and is primarily operated for the purpose of giving aid and support to the Communist Party. Pursuant to Section 13(f) of the Act, the following facts are respectfully submitted as illustrative of the above:

(1) The DCA came into existence under the plan, guidance and direction of the Communist Party, USA.

(a) In 1959, the Communist Party at its National Convention passed a resolution directed to the establishment of a national Marxist youth organization.

(b) Immediately following the 1959 National Convention of the Communist Party a program was adopted to implement the resolution directed to the establishment of a national Marxist youth organization and during 1960 under this program the Party appointed a National Youth Director and conducted meetings by Party leaders in such states as New York, Illinois, Minnesota and California in the planning and the promotion of a national organizing conference.

(c) From December 30, 1950 through January 1, 1961, Communist Party leaders and representatives actively participated in a national organizing conference which created the Progressive Youth Organizing Committee, an organization which served as a vehicle to bring into being the DCA.

(d) The decision to launch the national Marxist youth organization, which afterwards became known as the DCA, was made by the Communist Party in late 1963.

(e) DCA was established and organized under the direction and with the aid and support of the Communist Party, its leaders, members and representatives.

(f) Throughout various parts of the United States, members and officers of the Communist Party were assigned to attend the conference at which the DCA was founded, and to aid in the formation of the organization.

(g) Members and officers of the Communist Party directed the activities at the DCA founding Convention held in San Francisco, California on June 19 through 21, 1964.

(2) Since the formation of the DCA, up to and including the date of the filing of this petition, a substantial number of the persons who have been active in the management, direction, and supervision of the DCA have been active in the management, direction, and supervision of, and as representatives of the Communist Party. Through these persons the Party has guided and directed the affairs and activities of the DCA and has exercised direction and control over the formulation of the policies and programs of DCA. The following facts, among others, are illustrative thereof:

(a) A substantial number of officers of DCA throughout its existence have been and are leaders, members and representatives of the Communist Party and subject to its discipline.

(b) The Communist Party through its leaders, members, and representatives, has been active in the forma-

tion of chapters of the DCA, and in furnishing direction and guidance to the DCA.

(c) The affairs and policies of the DCA have been the subject of discussion at meetings of the Communist Party, and decisions of the Party governing these matters have been transmitted to the DCA.

(3) From its inception, DCA has received and continues to receive support, financial and otherwise, from the Communist Party, as illustrated by the following facts, among others:

(a) The Communist Party through its leaders, members, and representatives has furnished the leadership for the DCA, and through these individuals has supervised and advised, and continues to supervise and advise, DCA in its activities.

(b) The Communist Party contributed financial support to the DCA during the period it was being organized and has continued to contribute such support.

(c) The Communist Party has furnished speakers and lecturers for the respondent's meetings and other functions.

(d) At Communist Party meetings, and at other times and places, members of the Party have been urged and instructed to support the activities of the DCA; and, respondent's demonstrations, social affairs and activities have been supported by the Communist Party.

(e) The Communist Party has conducted classes in Marxism for members of the DCA and has supplied

literature to respondent for the education and indoctrination of its members in the principles of Marxism-Leninism.

(4) From its inception, up to and including the date of the filing of this petition, DCA has been and is primarily operated for the purpose of giving aid and support to the Communist Party, and to further and promote the Communist Party objective of developing a national Marxist youth organization as exemplified by, but not limited to, the following facts:

(a) DCA, in support of the Communist Party and its causes and objectives, has participated with and sponsored groups, organizations, protest marches, propaganda campaigns, picket lines, and has aided the Party in other ways.

(b) DCA has published and distributed a publication known as the "Spur" which contained articles and other writings supporting and urging support of Communist Party causes.

(c) DCA has printed, published and distributed such literature and propaganda material as policy statements, letters, organizational material, leaflets and other writings supporting and urging support of Communist Party causes.

(d) Through classes, training and indoctrination in Marxism-Leninism, DCA has prepared members for recruitment into the Communist Party.

(5) From its inception the DCA on matters of national and international affairs has uniformly adopted and sup-

ported the positions advanced by the Communist Party, and it has in no case deviated from them as illustrated by, but not limited to, the positions taken on nuclear testing, alleged colonial and neo-colonial exploitation, the institution of diplomatic relations with the Peoples Republic of China and with Cuba, the admission of China to the United Nations, the removal of the United States Naval Base from Guantanamo, and the lifting of travel restrictions to Cuba, China and North Vietnam.

WHEREFORE, your petitioner prays that the Board enter an order against the respondent, W. E. B. DuBois Clubs of America, requiring it to register as a Communist-front organization pursuant to Section 7 of the Act.

/s/ NICHOLAS DEB. KATZENBACH
Attorney General

/s/ J. WALTER YEAGLEY
Assistant Attorney General

/s/ ORAN H. WATERMAN
Attorney, Department of Justice

/s/ FRANCIS X. WORTHINGTON
Attorney, Department of Justice

/s/ ROBERT A. CRANDALL
Attorney, Department of Justice

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 515

W. E. B. DUBOIS CLUBS OF AMERICA, ET AL.,
APPELLANTS

v.

RAMSEY CLARK, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

The Solicitor General, on behalf of the Attorney General and the members of the Subversive Activities Control Board, moves the Court to affirm the judgment of the district court.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court (J.S. 1a–4a) dismissing the appellants' suit to enjoin, on constitutional grounds, enforcement of the registration provisions of the Subversive Activities Act of 1950, 50 U.S.C. 786. The

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action was instituted in April 1966,[1] a few weeks after the Attorney General had petitioned the Subversive Activities Control Board for an order requiring W. E. B. DuBois Clubs of America to register as a "Communist-front organization" (see J.S. 5a–11a) and before any administrative proceedings had been undertaken.[2] The immediate object of the suit was to halt the Board proceedings at their inception; the ultimate prayer was for a judgment declaring unconstitutional, and permanently enjoining the enforcement of, the provisions of the Act requiring Communist-front organizations to register.

After hearing, the three-judge court dismissed the complaint. It held that appellants could not short-circuit the statutory procedure, which provides for judicial review of any registration order after administrative proceedings have been concluded, observing (J.S. 3a):

> * * * The initiation of proceedings to require an organization to register under the Act may well present some practical problems in the area of free expression, but Congress has made careful provision that no tangible sanctions can

[1] In addition to the parent organization, W. E. B. DuBois Clubs of America, the plaintiffs were three local affiliates, three officers, and fourteen individuals, not members of any DuBois Club, who sued "individually and on behalf of all American citizens who seek to exercise without fear of retaliation on the fundamental rights guaranteed to all American citizens in the First Amendment * * *."

[2] No Board proceedings have been held to date. The Board took no action while the case was pending before the district court and administrative proceedings are now stayed by order of the court of appeals until the appeal is disposed of here (see J.S. 11, n. 8).

come into play until the facts have been explored in open hearing and the courts have scrutinized what they show, both in their adequacy to support a registration order and in their constitutional impact upon the statute itself.

ARGUMENT

The only question properly presented on this appeal is whether the district court abused its discretion in declining to entertain, before the prescribed administrative proceedings had been undertaken, a challenge to provisions of the Subversive Activities Control Act requiring Communist-front organizations to register, on the ground that those provisions are unconstitutional on their face. The constitutional questions themselves were not decided below and are not here. In our view, the district court correctly refrained from making a premature adjudication of those issues.

What was attempted here is, of course, contrary to the usual rule which requires exhaustion of a statutorily prescribed administrative remedy before recourse is made to the courts. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 543–545; *Fahey* v. *Mallonee*, 332 U.S. 245, 254, 256–258; *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481–482. Certainly, there is no basis for short-circuiting the statutory scheme here on the ground that the administrative procedures are deficient. Section 13 of the Act (50 U.S.C. 792) provides a full due process hearing in registration proceedings under Section 7. The respondent has the right to appear by counsel,

to subpoena witnesses and documents, and to cross-examine the Attorney General's witnesses; a full stenographic record is made and the Board is required to support its order with written findings of fact. And Section 14 (50 U.S.C. 793) provides for full judicial review in the court of appeals, and then, on certiorari, in this Court. See *Communist Party* v. *Control Board,* 367 U.S. 1. In this respect, as the Court itself has noted, the procedures of the McCarran Act are to be contrasted with those invalidated in *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, and *Dombrowski* v. *Pfister,* 380 U.S. 479—this last, a decision upon which appellants place much reliance. See 341 U.S. at 173, 380 U.S. at 495–496, n. 12.

Nor is appellants' attempt to circumvent the statutory procedure for judicial review justified here because they present constitutional arguments. See, *e.g., Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752, 771–774; *Allen* v. *Grand Cent. Aircraft Co.,* 347 U.S. 535, 553. On the contrary, that circumstance properly invokes the rule that constitutional questions—serious ones, especially[3]—should not be anticipated in advance of the necessity for deciding them. See *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568–585. No registration order having yet been entered, it is of course impossible to know whether the occasion for determining the constitutionality of the registration

[3] See *American Committee* v. *SACB,* 380 U.S. 503, 505; *Veterans of the Abraham Lincoln Brigade* v. *SACB,* 380 U.S. 513, 514, characterizing the constitutional questions raised here as "serious." See n. 4, *infra.*

provisions of the Act will ever arise in appellants' case.

To be sure, the claim now advanced is that the mere invocation of the law against appellants abridges First Amendment rights and *Dombrowski* v. *Pfister* is cited for the proposition that in those circumstances immediate judicial intervention is called for. But the fact is that the cases are not comparable. As already noted, the laws struck down in *Dombrowski* were plainly unconstitutional on their face and, there was, moreover, a persuasive showing that they were invoked discriminatorily to harass legitimate activities. And there, also, the immediacy of the injury resulting from pending prosecutions was clearly evident. At all events, however, it seems to us dispositive—as it did to the court below—that this Court, on the very day it decided *Dombrowski*, refused to adjudicate the very constitutional questions now advanced against the registration provisions of the McCarran Act on the ground that it was "neither necessary nor appropriate" to do so before it had been firmly established that the complainant was subject to the obligation of registering. *American Committee* v. *SACB*, 380 U.S. 503, 505; *Veterans of the Abraham Lincoln Brigade* v. *SACB*, 380 U.S. 513, 514.[4] The district court cannot be criticized for following that example.

[4] In both of those cases, as here, the registration provisions of the Act were challenged as unconstitutional on their face under the First Amendment and on the ground of vagueness. See p. 2, 22–24 of the petition and pp. 102–109 of petitioner's brief in No. 44, O.T. 1964; pp. 3, 13–15 of the petition and pp. 45–51 of petitioner's brief in No. 65, O.T. 1964.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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SEPTEMBER 1967.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 515

W. E. B. DUBOIS CLUBS OF AMERICA, *et al.*,

Appellants,

—v.—

RAMSEY CLARK, Attorney General of the United States, *et al.*

OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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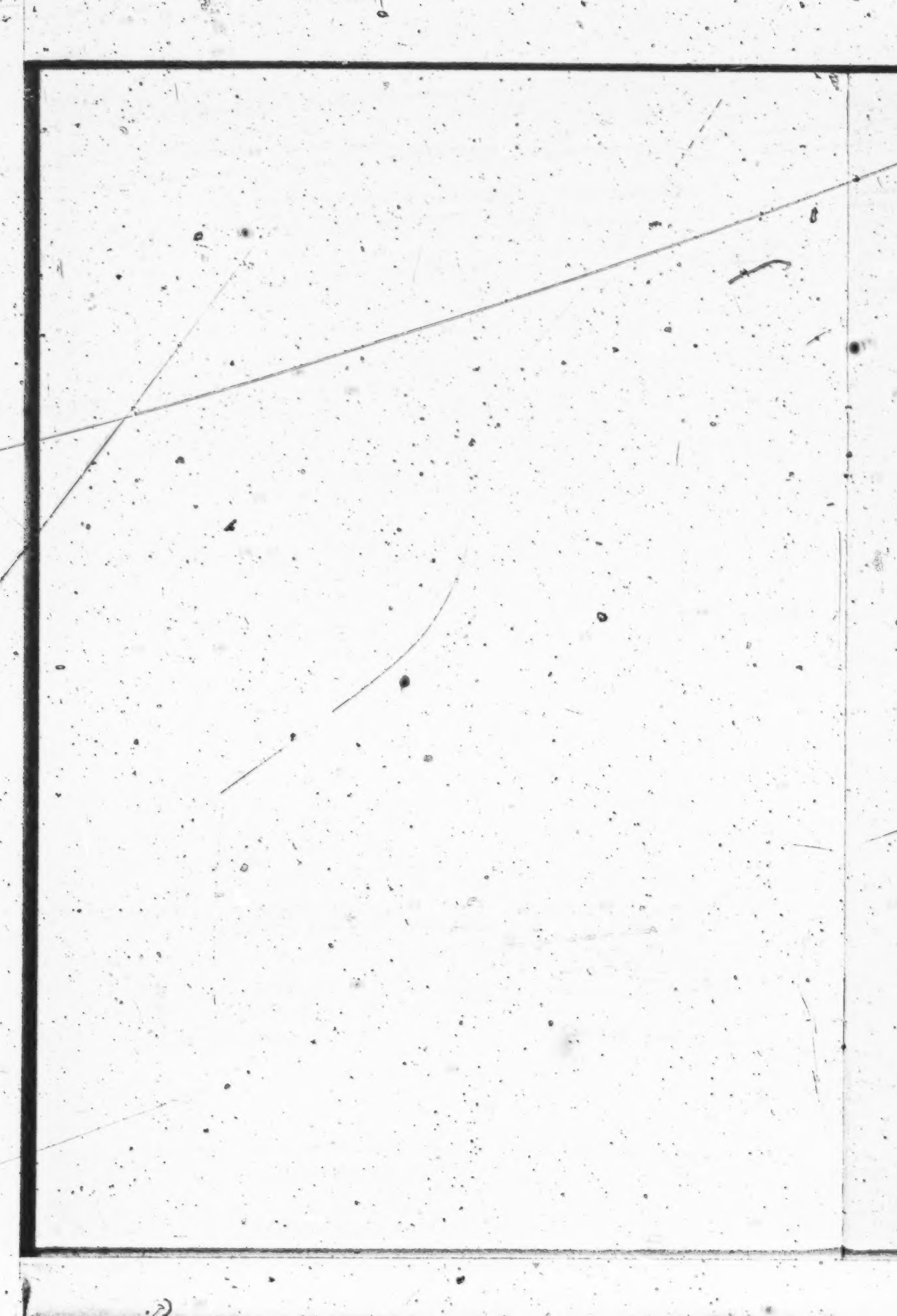

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OPPOSITION TO APPELLEES' MOTION TO AFFIRM

The government has moved to affirm the judgment below on the sole ground that the district court was correct in its ruling that appellants were required to exhaust their administrative remedy before they were entitled to a hearing on the constitutional issues raised by the Communist-front provisions of the McCarran Act. In so doing the government ignores the realities of the situation which were so clearly acknowledged by former Attorney General Nicholas deB. Katzenbach.

Shortly after the filing of the petition in the present case, Mr. Katzenbach made the following comments as reported by the *Daily Princetonian* on April 6, 1966.[1]

[1] The government attached this interview to its motion to dismiss below, thus acknowledging its accuracy.

> "The Attorney General pointed out that in most of the 23 instances where the act has been invoked in the past, the organizations called before the SACB have collapsed soon after this. 'But, I suppose, in part, that was one of the major purposes of the act' he remarked."

Certainly, where the administrative remedy itself causes the destruction of an organization, appellants should not be required to exhaust that remedy in order to raise constitutional issues which appear on the face of the statute, particularly where "one of the major purposes of the act" is to destroy the organization before it can obtain judicial review.

In any event, the applicability of this Court's holding in *Dombrowski* v. *Pfister*, 380 U. S. 479, to a situation such as raised in the present case is, in itself, a serious and substantial question requiring resolution by this Court. Cf. *Zwickler* v. *Koota*, No. 29 this Term. The contention by the court below and by the government (motion to affirm, p. 5), that this Court's decisions in *American Committee* v. *SACB*, 380 U. S. 503, and *Veterans of the Abraham Lincoln Brigade* v. *SACB*, 380 U. S. 513, are dispositive of this question is totally without basis. The question of the necessity to exhaust administrative remedies as a prerequisite to challenging the McCarran Act on its face was neither raised, argued, or considered by the Court in those cases. As a minimum, it cannot be said that the question is "so insubstantial as not to need further argument" (Rule 16 of this Court). Indeed, the wholly substantial nature of the question was recognized by the court below when it granted,

over the government's objection, appellants' request to stay further administrative proceedings pending this Court's resolution thereof.

Respectfully submitted,

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Appellants,

—against—

RAMSEY CLARK, Attorney General of the United States; JOHN M. MAHAN, Chairman, and JOHN S. PATTERSON, SIMON MCHUGH, LEONARD L. SELLS and EDWARD C. SWEENEY, all members of the Subversive Activities Control Board,

Appellees.

PETITION FOR REHEARING ON GRANTING OF MOTION OF APPELLEES TO AFFIRM THE DISMISSAL OF THE COMPLAINT ON THE GROUND THAT APPELLANTS HAD FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

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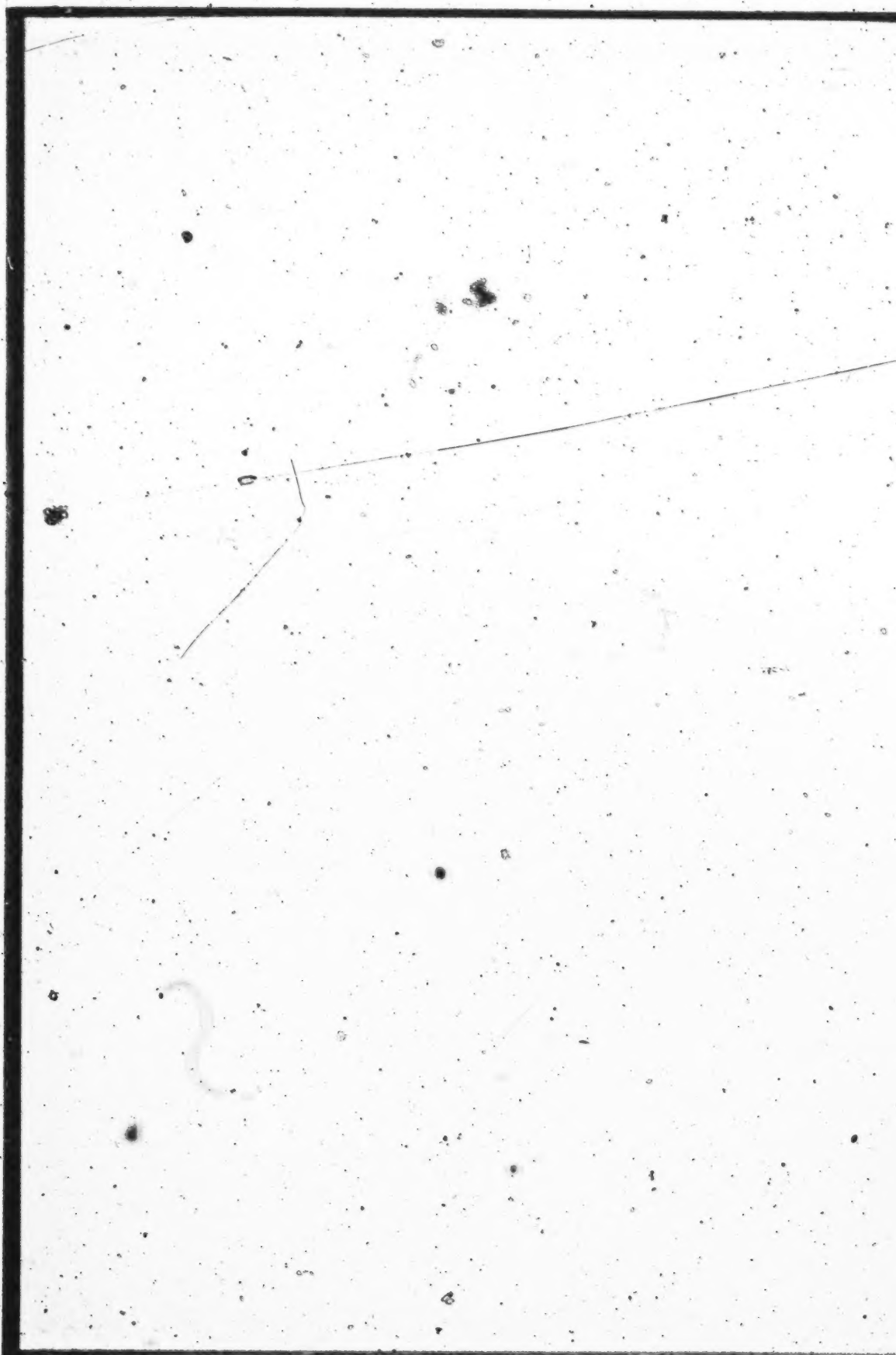

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Appellees.

PETITION FOR A REHEARING

Appellants request the Court to reconsider its ruling of December 11, 1967.

The Court's attention is respectfully called to the Jurisdictional Statement heretofore filed by appellants.

The Subversive Activities Control Act of 1950 was amended on January 2, 1968. The text of said amendment is attached hereto as an Appendix.

The statute, as amended, is, to put it conservatively, even more "at war with the First Amendment"[1] than its predecessor. For example, the definition of a "Communist-front organization" has been further "liberalized" to provide that an organization may be registered as a "Communist-front organization" if it "is substantially directed, dominated or controlled by *one* or more members of a Communist-action organization . . . ." [emphasis added][2] The Act previously defined a "Communist-front organization" as one which "is substantially directed, dominated or controlled by a Communist-action organization."[3]

The overbreadth of the original provision was eloquently discussed by Mr. Justice Douglas in his dissent to the *per curiam* affirmance.[4] The new alternate provision facil-

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[1] *W. E. B. DuBois Clubs of America, et al.* v. *Clark, et al.*, October Term, 1967, No. 515, slip opinion 5.

[2] Appendix, p. 2a.

[3] 50 U. S. C. 782 (4) (A).

[4] *W. E. B. DuBois Clubs, et al.* v. *Clark, et al., supra*, pp. 8-9. Compare Mr. Justice Douglas' assertion that: "[H]arassing them by public hearings and by probing into their beliefs and attitudes, pilloring them for their minority views by exposing them to the hearings under the Act—these actions will have the same 'chilling' effect as the Court held the trial in *Dombrowski* would have had" with that of House Majority Leader Carl Albert, in discussing the new amendment, that "[T]he 1967 act declared that the protection of our national security requires that Communist-action and Communist-front organizations be exposed to the critical light of publicity. This shall henceforth be the primary purpose of hearings and declarations by the SACB." *Congressional Record*, December 27, 1967, A6344.

itates bringing within the scope of the definitions section "advocacy, espousal and teaching of a creed or of causes for which the Communist movement stands."[5] The "serious consequences" of classification as a Communist-front organization, as outlined by Mr. Justice Douglas,[6] have been augmented in the new statute to include more expansive identification statements with reference to the use of the mails and the airwaves as well as a new area of such identification, viz., the solicitation of "any money, property, thing or service . . . ."[7]

Moreover, the new statute further provides that the Subversive Activities Control Board "shall cease to exist on June 30, 1969" unless between the date of its enactment and December 31; 1968, a proceeding thereunder "shall have been instituted before the Board and a hearing under this Act shall have been conducted by the Board."[8] The adverse effect of such congressional pressure upon the Board insofar as appellant DuBois Clubs of America is concerned needs no elaboration. It is enough to point out that when the existence of a governmental agency depends upon its exercise of its powers, those powers will be exercised.

Because, under the new legislation, the DuBois Clubs of America will be the critical case upon which the life of the agency will depend, there is little hope to expect that the organization will receive a fair and impartial hearing. Since, as demonstrated in our Jurisdictional Statement,

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[5] Id., at 8.

[6] Id., at 8-9.

[7] Appendix, p. 6a.

[8] Appendix, p. 7a.

the statute is unconstitutional at its face, there is no reason to require the affected appellant to undergo a long expensive and arduous hearing which can, under the circumstances, be no more than a farce.

We submit that, in the light of the above, appellants are entitled to an opportunity to brief and argue these important questions before the Court and to demonstrate the effect of the provisions of the new Act upon them or, at a minimum, to be granted leave to amend their complaint below to include an attack on its constitutionality.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement, it is respectfully urged that rehearing be granted and that, upon such rehearing, probable jurisdiction of the within appeal be noted or, in the alternative, appellants be granted leave to amend their complaint below to include an attack on the constitutionality of the Subversive Activities Control Act of 1950, as amended on January 2, 1968.

Respectfully submitted,

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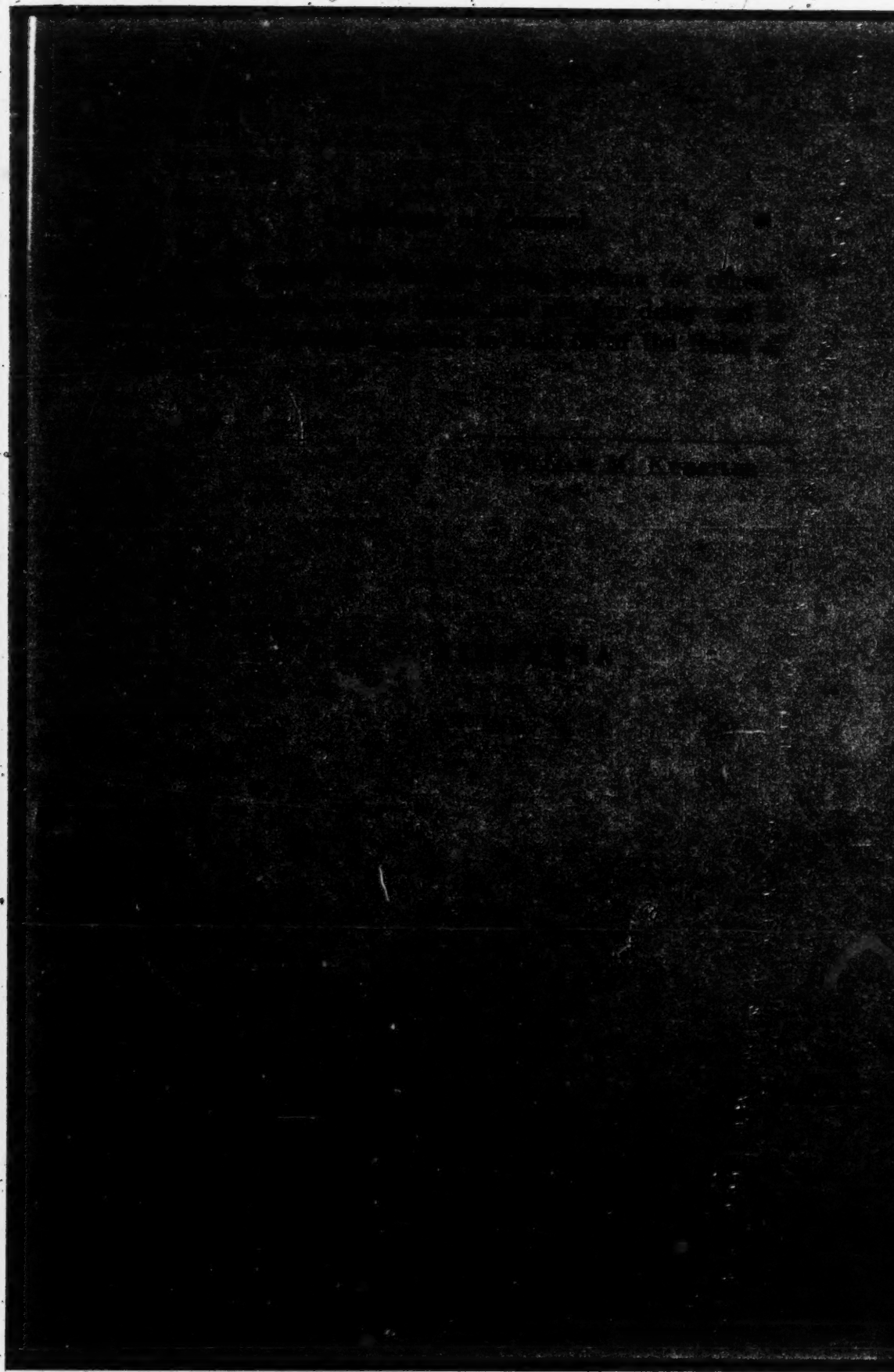
Attorneys for Appellants

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....

WILLIAM M. KUNSTLER



APPENDIX

HOUSE OF REPRESENTATIVES

90TH CONGRESS
1st Session

REPORT
No. 1038

AMENDING THE SUBVERSIVE ACTIVITIES CONTROL ACT OF 1950

That section 2 of the Subversive Activities Control Act of 1950 is amended by adding immediately after paragraph (15) the following new paragraph:

"(16) The findings of fact contained in paragraphs (1) through (15) of this section are reiterated. Recent court decisions involving the registration provisions of this Act make it necessary to enact legislation to accomplish the purposes of such Act without the requirements of registration. Disclosure of Communist organizations and of the members of Communist-action organizations as provided in this Act is essential to the protection of the national welfare."

SEC. 2. (a) Paragraphs (3) and (4) of section 3 of such Act are amended to read as follows:

"(3) The term 'Communist-action organization' means any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives

of such world Communist movement referred to in section 2 of this title.

"(4) The term 'Communist-front organization' means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, or (B) is substantially directed, dominated, or controlled by one or more members of a Communist-action organization, and (C) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title."

(b) Paragraph (12) of section 3 is amended by inserting "or 13A" immediately after "section 13".

SEC. 3. Subsection (f) of section 4 of such Act is amended by striking the last sentence.

SEC. 4. Section 5(a) of such Act is amended to read as follows:

"SEC. 5. (a) When there is in effect a final order of the Board determining any organization to be a Communist-action organization or a Communist-front organization, it shall be unlawful—

"(1) For any member of such organization, with knowledge or notice of such final order of the Board—

"(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

"(B) to hold any nonelective office or employment under the United States; or

"(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

"(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

"(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U.S.C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.

"(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice of such final order of the Board—

"(A) to contribute funds or services to such organization; or

"(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of paragraph (1) of this subsection."

SEC. 5. Sections 7 and 8 of such Act are hereby repealed.

SEC. 6. Section 9 of such Act is amended to read as follows:

"RECORDS OF FINAL ORDERS OF THE BOARD; PUBLIC INSPECTION; REPORTS TO PRESIDENT AND CONGRESS

"SEC. 9. (a) The Board shall keep and maintain records, which shall be open to public inspection, giving the names and addresses of all organizations as to which, and individuals as to whom, there are in effect final orders of the Board issued pursuant to any of the provisions of subsections (g) through (j), inclusive, of section 13, or subsection (f) of section 13A.

"(b) Copies of all public proceedings and hearings before the Board, including the reports and orders of the Board, shall be furnished by the Board to any person upon request and upon the payment of the reasonable costs thereof as then currently fixed by the Board.

"(c) The Board shall submit to the President and to the Congress on or before June 1 of each year (and at any other time when requested by either House by resolution) a report giving the names and addresses of all Communist-action, Communist-front, or Communist-infiltrated organizations as to which, and all individual members of Communist-action organizations as to whom, there are in effect such final orders of the Board."

SEC. 7. Section 10 of such Act is amended to read as follows:

"USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

"SEC. 10. It shall be unlawful for any organization with respect to which there is in effect a final order of the Board

determining it to be a Communist organization as defined in paragraph (5) of section 3 of this title, or for any person with knowledge or notice of such final order acting for or on behalf of any such organization—

"(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General: 'Disseminated by .....,' (with the name of the organization in lieu of the blank) 'an organization determined by final order of the Subversive Activities Control Board to be a Communist-.....organization' (setting forth in lieu of the blank whether action, front, or infiltrated, as the case may be); or

"(2) to broadcast or cause to be broadcast any matter over any radio or television station in the United States, unless such matter is preceded by the following statement: 'The following program is sponsored by .....,' (with the name of the organization in lieu of the blank) 'an organization determined by final order of the Subversive Activities Control Board to be a Communist-..... organization' (setting forth in lieu of the blank whether action, front, or infiltrated, as the case may be); or

"(3) to use the United States mails or any means, facility, or instrumentality of interstate or foreign commerce, including but not limited to radio and television broadcasts, to solicit any money, property, thing, or service, unless such solicitation if made orally is preceded by the following statement, and if made in writing or in print is preceded by the following written or printed statement: 'This solicitation is made for or on behalf of .....,' (with the name of the organization in lieu of the blank) 'an organization determined by final order of the Subversive Activities Control Board to be a Communist-..... organization' (setting forth in lieu of the blank whether action, front, or infiltrated, as the case may be)."

SEC. 8. Section 11 of such Act is amended to read as follows:

"DENIAL OF TAX DEDUCTIONS AND EXEMPTIONS

"Sec. 11. (a) Notwithstanding any other provision of law, no deduction for Federal income tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution there is in effect a final order of the Board determining such organization to be a Communist-action, Communist-front, or Communist-infiltrated organization.

"(b) No organization shall be entitled to exemption from Federal income tax, under section 501 of the Internal Revenue Code of 1954, for any taxable year if at any time during such taxable year there is in effect a final order of the Board determining such organization to be a Commu-

nist-action, Communist-front, or Communist-infiltrated organization."

SEC. 9. (a) Paragraph (2) of subsection (e) of section 12 of such Act is amended to read as follows:

"(2) upon application made by the Attorney General under section 13(a) of this title, or by any individual under section 13(b) of this title, to determine whether any individual is a member of any organization as to which there is in effect a final order of the Board determining such organization to be a Communist-action organization; and".

(b) Section 12 of such Act is amended by adding at the end thereof the following new subsection:

"(i) The Board shall cease to exist on June 30, 1969, unless in the period beginning on the date of enactment of this subsection and ending on December 31, 1968, a proceeding under this Act shall have been instituted before the Board and a hearing under this Act shall have been conducted by the Board. On or before June 30, 1968, the Attorney General shall report to the Congress on the proceedings he has instituted before the Board under this Act during the period from the enactment of this subsection to the date of the report, and the Board shall report on the progress it has made in conducting hearings under the Act during such period. If no proceedings have been instituted before the Board by the Attorney General, the Attorney General shall report his reasons for not having done so. If no hearings have been conducted, the Board shall report the reasons for not having done so. Similar reports shall be filed by the Attorney General and the Board on or before

January 10, 1969, and each year thereafter, to cover the immediately preceding calendar year."

SEC. 10. (a) The caption to section 13 of such Act is amended by striking out "REGISTRATION".

(b) Subsections (a) and (b) of section 13 of such Act are amended to read as follows:

"(a) Whenever the Attorney General shall have reason to believe that any organization is a Communist-action organization or a Communist-front organization, or that any individual is a member of an organization which has been determined by final order of the Board to be a Communist-action organization, he shall file with the Board and serve upon such organization or individual, as the case may be, a petition for a determination that such organization is a Communist-action or Communist-front organization, or determining that such individual is a member of such Communist-action organization. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support thereof. Two or more such individual members of a Communist-action organization or of any section, branch, fraction, cell, board, committee, commission, or unit thereof, may be joined as respondents in one petition for an order determining each of such individuals to be a member of such organization. A dissolution of any organization subsequent to the date of the filing of any petition for a determination that such organization is a Communist-action or Communist-front organization shall not moot or abate the proceedings, but the Board shall receive evidence and proceed to a determination of the issues: Provided, however, That if the Board shall find such organization to be a Com-

munist-action or Communist-front organization as of the time of the filing of such petition and prior to its alleged dissolution, and shall find that a dissolution of the organization has in fact occurred, the Board shall enter an order determining such organization to be a Communist-action or Communist-front organization, as the case may be, and the Board shall include it as such in the appropriate records maintained pursuant to section 9 of this title, together with a notation of its dissolution.

"(b) Any organization as to which there is in effect a final order of the Board determining it to be a Communist-action or Communist-front organization, and any individual as to whom there is in effect a final order of the Board determining such individual to be a member of a Communist-action organization may, not more often than once in each calendar year, file with the Board and serve upon the Attorney General a petition for a determination that such organization no longer is a Communist-action or Communist-front organization, or that such individual no longer is a member of a Communist-action organization, as the case may be. Each petition filed under this subsection shall be verified under oath, and shall contain a statement of the facts relied upon in support thereof. Upon the filing of any such petition, the Board shall serve upon each party to such proceeding a notice specifying the time and place for hearing upon such petition. No such hearing shall be conducted within twenty days after the service of such notice."

(c) Subsection (c) of section 13 of such Act is amended by inserting immediately preceding the last sentence the following new sentence: "No person, on the ground or for the reason that the testimony or evidence, documentary

or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture, shall be excused from testifying or producing documentary evidence before the Board in obedience to a subpena of the Board issued on request of the Attorney General when the Attorney General represents that such testimony or evidence is necessary to accomplish the purposes of this title; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he, under compulsion as provided in this subsection, may testify, or produce evidence, documentary or otherwise, before the Board in obedience to a subpena issued by it: Provided, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

(d) Subsection (d) of section 13 of such Act is amended by striking out paragraph (2) and inserting in lieu thereof the following:

"(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board in proceedings initiated pursuant to subsection (a) of this section, the Board shall, nevertheless, proceed to receive evidence, make a determination of the issues, and enter such order as shall be just and appropriate. Upon failure of an organization or individual to appear at a hearing accorded to such organization or individual in proceedings under subsection (b) of this section the Board may forthwith and without further proceedings enter an order dismissing the petition of such organization or individual.

"(3) Any person who, in the course of any hearing before the Board or any member thereof or any examiner

designated thereby, shall misbehave in their presence or so near thereto as to obstruct the hearing or the administration of the provisions of this title, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. Whenever a statement of fact constituting such misbehavior is reported by the Board to the appropriate United States attorney, it shall be his duty to bring the matter before the grand jury for its action.

"(4) The authority, function, practice, or process of the Attorney General or Board in conducting any proceeding pursuant to the provisions of this title shall not be questioned in any court of the United States, nor shall any such court, or judge or justice thereof, have jurisdiction of any action, suit, petition, or proceeding, whether for declaratory judgment, injunction, or otherwise, to question such authority, function, practice, or process, except on review in the court or courts having jurisdiction of the actions and orders of the Board pursuant to the provisions of section 14, or when such authority, function, practice, or process, is appropriately called into question by the accused or respondent, as the case may be, in the court or courts having jurisdiction of his prosecution or other proceeding (or the review thereof) for any contempt or any offense charged against him pursuant to the provisions of this title."

(e) Paragraph (1) of subsection (f) of section 13 of such Act is amended to read as follows:

"(1) the extent to which persons who are active in its management, direction, or supervision, whether or

not holding office therein, are active in the management, direction, or supervision of, or as representatives or members of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and".

(f) Subsections (g), (h), (i); (j), and (k) of section 13 of such Act are amended to read as follows:

"(g) If, after hearing upon a petition filed under subsection (a) of this section the Board determines—

"(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order determining the organization to be a Communist-action organization or a Communist-front organization as the case may be; or

"(2) that an individual is a member of a Communist-action organization it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order determining such individual to be a member of a Communist-action organization.

"(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

"(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon the Attorney General

an order denying the determination sought by his petition, and shall send a copy of such order to such organization; or

"(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon the Attorney General an order denying the determination sought by his petition, and shall send a copy of such order to such individual.

"(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

"(1) that an organization no longer is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon the Attorney General and such organization an order determining that the organization no longer is a Communist-action organization or Communist-front organization as the case may be; or

"(2) that an individual no longer is a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon the Attorney General and such individual an order determining that such individual no longer is a member of a Communist-action organization.

"(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

"(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for a determination that the organization no longer is a Communist-action organization or a Communist-front organization as the case may be; or

"(2) that an individual is a member of a Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon such individual an order denying his petition for a determination that the individual no longer is a member of a Communist-action organization.

"(k) When any order of the Board issued under subsection (g), (h), (i), or (j) of this section becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all persons that such order has become final."

SEC. 11. Section 13A of such Act is amended as follows:

(1) Subsection (a) of such section is amended by inserting immediately preceding the last sentence the following new sentence: "A dissolution of such organization subsequent to the date of the filing of any petition for a determination that it is Communist-infiltrated, shall not moot or abate the proceedings, but the Board shall receive evidence and proceed to a determination of the issues: Pro-

vided, however, That if the Board shall determine such organization to be a Communist-infiltrated organization as of the time of the filing of such petition and prior to its alleged dissolution, and shall find that a dissolution of the organization has in fact occurred, the Board shall enter an order determining such organization to be a Communist-infiltrated organization and the Board shall include it as such in the appropriate records maintained pursuant to section 9 of this title, together with a notation of its dissolution."

(2) Subsection (d) of such section is amended to read as follows:

"(d) The provisions of subsections (c) and (d) of section 13 shall apply to hearings conducted under this section."

SEC. 12. The seventh sentence of subsection (a) of section 14 of such Act is amended to read as follows: "If the court shall set aside an order issued under subsection (j) of section 13, or under subsection (f) of section 13A, it may, in the case of an organization, enter a judgment requiring the Board to issue an order determining that such organization no longer is a Communist-action organization, Communist-front organization, or a Communist-infiltrated organization, as the case may be, or in the case of an individual, enter a judgment requiring the Board to issue an order determining that such individual no longer is a member of a Communist-action organization."

SEC. 13. Section 15 of such Act is amended to read as follows:

"PENALTIES

"SEC. 15. Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000. Any individual who violates any provision of section 5 or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment."

SEC. 14. (a) In the case of any organization which, by proceedings under section 13(a) of the Subversive Activities Control Act of 1950 completed before the date of enactment of this Act, has been finally determined by the Subversive Activities Control Board to be a Communist-action organization or a Communist-front organization and has been ordered to register as a result of such determination, the Board shall forthwith modify its previously issued registration order as may be necessary to conform such order to the provisions of section 13(g) of the Subversive Activities Control Act of 1950, as amended by this Act, and shall forthwith include such organization on the record required to be maintained under section 9 of the Subversive Activities Control Act of 1950, as amended by this Act. Nothing in this subsection shall be construed so as to prevent any such organization from filing a petition as provided in subsection (b) of section 13 of the Subversive Activities Control Act of 1950, as amended by this Act.

(b) In the case of any proceeding pending before the Board on the date of enactment of this Act, the Board and the Attorney General are authorized to proceed in accordance with the provisions of the Subversive Activities Control Act of 1950, as amended by this Act.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

DuBOIS CLUBS OF AMERICA ET AL. *v.* CLARK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 515. Decided December 11, 1967.

PER CURIAM.

On March 4, 1966, the Attorney General petitioned the Subversive Activities Control Board for an order, after appropriate hearings, requiring the DuBois Clubs of America to register with the Attorney General as a Communist-front organization.[1] On April 26, 1966, before hearings were held, appellants attempted to bypass the Board by suing in the District Court.[2] Appellants' complaint in the District Court alleged that the Communist-front registration provisions of the Act were unconstitutional.[3] The complaint also alleged that

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[1] The term "Communist-front organization" is defined in 50 U. S. C. § 782 (4). Communist-front organizations are required to register with the Attorney General. 50 U. S. C. § 786. When a Communist-front organization does not register, the Attorney General may petition the SACB for an order requiring registration. 50 U. S. C. § 792.

[2] On April 27, 1966, appellants also filed with the Board a motion to dismiss the Attorney General's petition. The Board denied this motion and, subsequently, on August 18, 1966, appellants filed an answer to the Attorney General's petition. According to the District Court, the DuBois Clubs "(1) denied generally that it was a Communist-front organization within the meaning of the Act, and (2) denied various allegations of fact made by the Attorney General in the petition."

[3] Appellants attacked the provisions, 50 U. S. C. §§ 786 (b), (c), and (d), "on their face and as applied" as violations of Art. 1, § 9, cl. 3, Art. 3, and the First, Fifth, Eighth, Ninth, Tenth, Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution. Although the Communist-front provisions have been upheld by

the "very pendency of these administrative proceedings . . . has resulted and will continue to result . . . in immediate and irreparable injury to fundamental constitutional rights . . . ." Appellants asked the District Court for an order declaring the Communist-front registration provisions unconstitutional and also for an order enjoining the Attorney General and the SACB from enforcing them. A three-judge District Court, convened on appellants' motion, dismissed the complaint because appellants had failed to exhaust their administrative remedies.[4] This appeal followed.

Before there may be proceedings to punish appellants for failure to register with the Attorney General, the SACB must first find that the DuBois Clubs is a Communist-front organization and issue an order to that effect.[5] The Act provides for a full evidentiary hearing which is to be held in public. Appellants may be represented by counsel, offer oral or documentary evidence, submit rebuttal evidence, and conduct cross-examination. The SACB must make a written report and state its finding of fact. If appellants are aggrieved by the Board's order, they may obtain review in the United States Court of Appeals for the District of Columbia Circuit which may set aside the order if it is not "supported by the pre-

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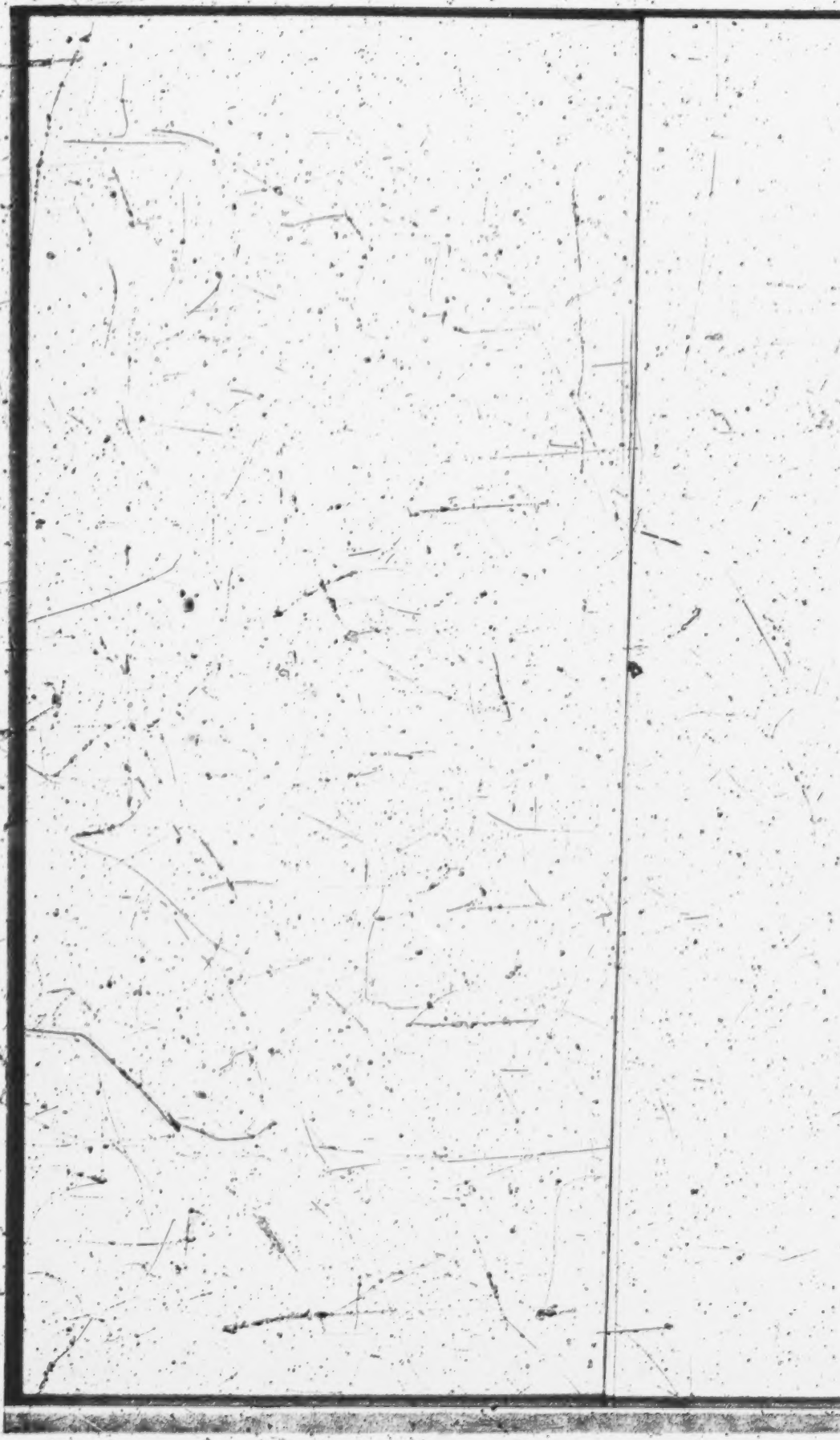
the District of Columbia Circuit, *American Committee for Protection of Foreign Born* v. *SACB*, 331 F. 2d 53, 61 (1963), reversed on other grounds, 380 U. S. 503 (1965); *Veterans of Abraham Lincoln Brigade* v. *SACB*, 331 F. 2d 64, 73 (1963), reversed on other grounds, 380 U. S. 513 (1965); *Weinstock* v. *SACB*, 331 F. 2d 75 (1963); *Jefferson School of Social Science* v. *SACB*, 331 F. 2d 76 (1963), their constitutionality has not been specifically determined by this Court. *American Committee for Protection of Foreign Born* v. *SACB*, 380 U. S. 503 (1965); *Veterans of Abraham Lincoln Brigade* v. *SACB*, 380 U. S. 513 (1965). Cf. *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

[4] However, the District Court did stay further Board proceedings pending this Court's disposition of the case.

[5] 50 U. S. C. § 794 (*a*).



ponderance of the evidence."[6] Upon motion of a party, the Court of Appeals may order the Board to take additional evidence. Of course, if the Board and the Court of Appeals find that the Act does cover appellants, they may challenge its constitutionality either as applied or on its face. Judgments of the Court of Appeals are reviewable by this Court on certiorari.[7]

It is evident that Congress has provided a way for appellants to raise their constitutional claims. But appellants, denying that they are within the coverage of the Act, wish to litigate these claims in an injunctive proceeding in the District Court. The effect would be that important and difficult constitutional issues would be decided devoid of factual context and before it was clear that appellants were covered by the Act.[8] We have previously refused to decide the constitutionality of the very provisions involved here because it was not clear that the Act would be applied to the objecting parties. *American Committee for the Protection of Foreign Born* v. *SACB*, *supra*; *Veterans of Abraham Lincoln Brigade* v. *SACB*, *supra*. Similarly, the District Court should not be forced to decide these constitutional questions in a vacuum.

Appellants rely on *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), to support their contention that the usual rule requiring exhaustion of administrative remedies[9]

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[6] See *National Council of American-Soviet Friendship* v. *SACB*, 322 F. 2d 375 (1963).

[7] See 50 U. S. C. §§ 792 (d), (g), 50 U. S. C. § 793 (a).

[8] Cf. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–585 (1947).

[9] See, *e. g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938); *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 543–545 (1946); *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 771–774 (1947); *Allen* v. *Grand Cent. Aircraft Co.*, 347 U. S. 535, 553 (1954); *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 481–482 (1964).

should not apply in this case. In *Dombrowski*, however, the constitutional issues were presented in a factual context. Upon a record demonstrating a history of harassment of petitioners in connection with their exercise of First Amendment rights, the Court ordered a federal district court to issue an injunction against pending criminal prosecutions under state statutes. This Court held the statutes "void on their face," and it concluded that, in the circumstances of that case, if appellants were required to submit to a criminal prosecution, the injury to First Amendment freedoms which had already taken place would be compounded. Accordingly, the Court allowed appellants to assert their claims in an equitable proceeding.

In this case, the complaint and the affidavits constitute no more than conclusory allegations that the purpose of the threatened enforcement of the Act was to "harass" appellants and that harassment was the intended result of the Attorney General's announcement that he had filed a petition with the SACB. Further, appellants are not being forced to assert their claims in a criminal prosecution. As the court below made clear, "Congress has made careful provision that no tangible sanction can come into play until the facts have been explored in open hearing [before the Board] and the courts have scrutinized what they show, both in their adequacy to support a registration order and in their constitutional impact upon the statute itself." [10] In the context of this case, we decline to require the court below to permit substitution of an injunctive proceeding for the civil proceeding which Congress has specifically provided.

The motion to affirm is granted and the judgment is affirmed.

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I believe that the provisions of the Act now challenged are void on their face, that there are no factual issues

[10] See 50 U. S. C. §§ 793 (b), 794.

to be resolved which should condition the outcome of the litigation, and that therefore there is no reason for the lower court to abstain from exercising its jurisdiction.

The statute defines "Communist-front organization" as one which is substantially directed, dominated, or controlled by a Communist-action organization and which is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement. 50 U. S. C. § 782 (4). A Communist-front organization, as defined, is not a group engaged in *action* but in *advocacy;* or if *action* is included, so is advocacy, for § 781 (15) in describing the growth of the Communist movement speaks of those who seek "converts far and wide by an extensive system of schooling and indoctrination."

Legislation curbing or penalizing *advocacy* even of ideas we despise is, I submit, at war with the First Amendment. Under our Constitution one's belief or ideology is of no concern to government. One can think as he likes, embrace any philosophy he chooses, and select the politics that best fits his ideals or needs. That is all implicit in the First Amendment rights of assembly, petition, and expression. Those rights merely enforce, protect, or sanction the beliefs or ideology to which one is committed. So does the right of association which we have said over and again to be part and parcel of those First Amendment rights. Basic in this scheme of values is the immunity of beliefs, ideas, and ideology from government inquiry, probing, or surveillance.[1]

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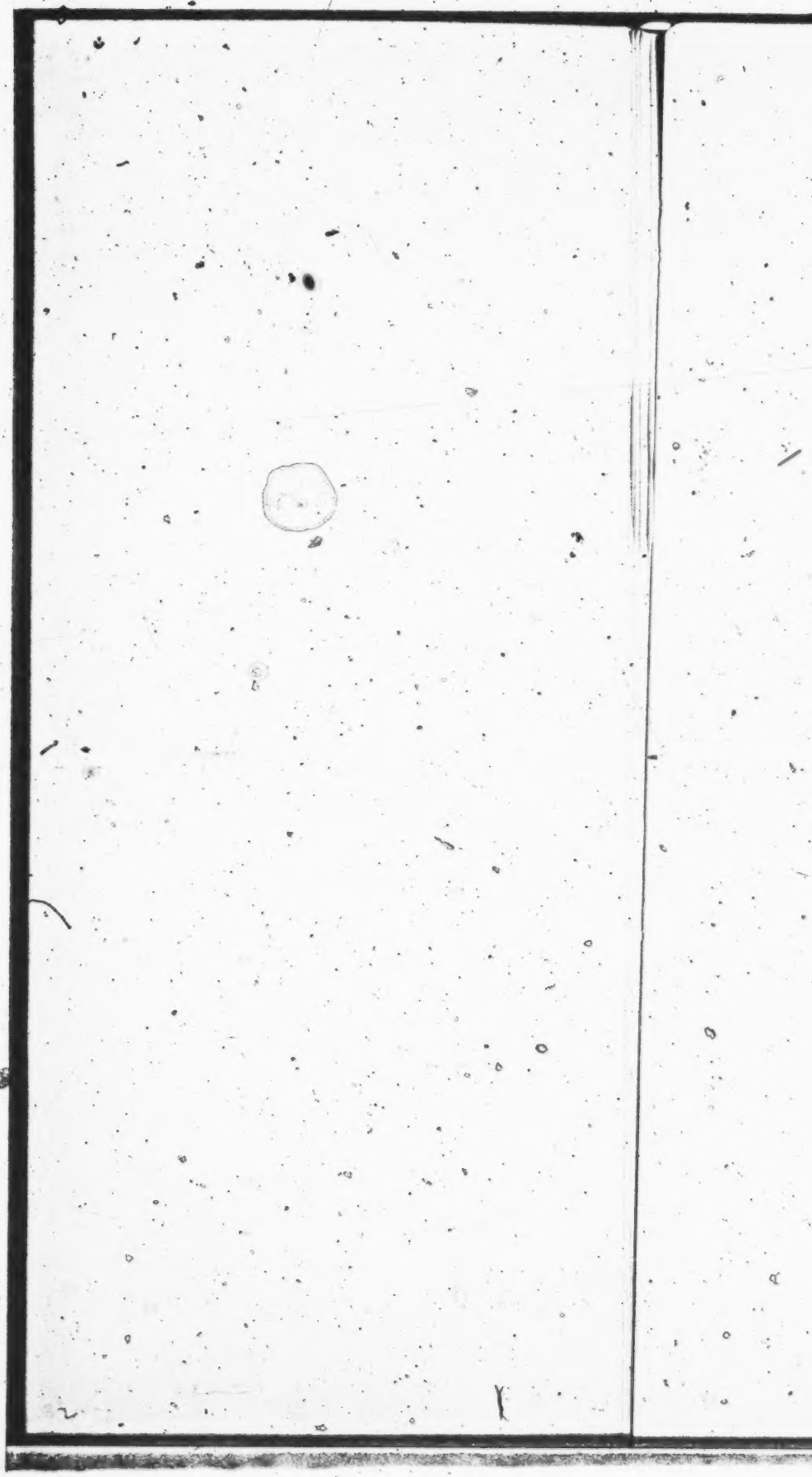
[1] Hannah Arendt writes:

"The word 'people' retained for them [the Founding Fathers] the meaning of manyness, of the endless variety of a multitude whose majesty resided in its very plurality. Opposition to public opinion, namely to the potential unanimity of all, was therefore one of the many things upon which the men of the American Revolution were in complete agreement; they knew that the public realm in a republic was constituted by an exchange of opinion between equals, and that this realm would simply disappear the very moment



Jefferson expressed the American constitutional theory:

> "[T]he opinions of men are not the object of civil government nor under its jurisdiction . . . . [I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . . ." Jefferson, A Bill For Establishing Religious Freedom, in The Jefferson Cyclopedia 976 (1900).

That is my reading of the First Amendment. Those who can be officially pilloried or punished for having a particular philosophic or political creed are effectively deterred from exercising First Amendment rights.

I see no constitutional method whereby the Government can punish or penalize one for "being a Communist" or "supporting Communists" or "promoting communism." Communism, as an ideology, embraces a broad array of ideas. To some it has appeal because the state owns the main means of production, with the result that all phases of national life are in the public sector, guaranteeing full employment. To some communism means a medical care program that reaches to the lowest levels of society. To others the communal way of life, even in agriculture, means a fuller life for the average person. To some the flowering of the dance, music, painting, sculpturing, and even athletics is possible only when those arts and activities move from the private to the public sector. To some there can be no equivalent of the unemployment insurance, old age insurance, and social security that obtain in a socialized state. To others communism is a commitment to the atheistic philosophy and way of life. To still others, adherence to communism means a commitment to use force and violence, if necessary, to achieve that kind of socialist state. And to some

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an exchange became superfluous because all equals happened to be of the same opinion." On Revolution (1963) 88–89.

of course it means all of the projects I have enumerated plus perhaps others as well.

The word "revolution" has of course acquired a subversive connotation in modern times. But it has roots that are eminently respectable in American history.[2] This country is the product of revolution. Our very being emphasizes that when grievances pile high and there are no political remedies, the exercise of sovereign powers reverts to the people. Teaching and espousing revolution—as distinguished from indulging in overt acts—are therefore obviously within the range of the First Amendment.

Dennis v. *United States*, 341 U. S. 494, decided in 1951 at the peak of the notorious "witch hunt" in this Nation, is to the contrary. My Brother BLACK and I, the only remaining members of the Court who sat in that case, dissented. The crime charged and sustained was a conspiracy to teach and advocate the Marxist creed, including the overthrow of the Government by force or violence. *Id.*, at 497. No overt acts designed to overthrow the Government were charged; no attempt to overthrow was charged. The crime was an agreement to teach, advocate, and espouse a creed that was and is noxious to most Americans.

I cannot believe that *Dennis* has any continuing vitality. It is out of line with *Terminiello* v. *Chicago*, 337 U. S. 1, where a fascist was held to be protected by the

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[2] "America had become the symbol of a society without poverty long before the modern age in its unique technological development had actually discovered the means to abolish that abject misery of sheer want which had always been held to be eternal. And only after this had happened and had become known to European mankind could the social question and the rebellion of the poor come to play a truly revolutionary role. The ancient cycle of sempiternal recurrences had been based upon an assumedly 'natural' distinction of rich and poor; the factual existence of American society prior to the outbreak of the Revolution had broken this cycle once and for all." Arendt, On Revolution (1963) 15–16.

First Amendment for espousing his creed, which most Americans find as obnoxious as communism.

It is not conceivable that the Court that decided *Dombrowski* v. *Pfister*, 380 U. S. 479, would approve *Dennis*. In *Dombrowski* a state prosecution for subversion was enjoined. The people prosecuted were fostering civil rights for Negroes in the South. While it would have been possible to win the state case on constitutional grounds, the Court held that the trial itself would result in irreparable injury. We said:

> "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Id.*, at 486.

A Communist-front organization under the present Act is a group promoting the world Communist movement. See 50 U. S. C. § 782 (4). If it were defined as a group which, for example, collected arms for the violent overthrow of government, the case would be free of First Amendment problems. But here as in *Dombrowski* the statute is overbroad, bringing within its scope advocacy, espousal, and teaching of a creed or of causes for which the Communist movement stands.

If an organization is classified a Communist front, serious consequences follow: employment of its members is restricted, § 784; application for or use of passports is made illegal, § 785; registration is required, § 786; use of the mails and of the radio and TV is curtailed, § 789; tax exemptions are denied, § 790. At least some of these provisions are unconstitutional under our decisions as bills of attainder or as a denial of First and Fifth Amendment rights. Yet vindication would come only after long and protracted hearings and appeals. Meanwhile there would be a profound "chilling" effect on the exercise of

First Amendment rights [3] within the principle of *Dombrowski* v. *Pfister*.

The members of the DuBois Clubs may or may not be Communists. But as I said, I see no possibility under our Constitution of penalizing one for holding or expressing that or any other belief. The DuBois Clubs may advocate causes that parallel Communist thought or Communist policies.[4] They appear, for example, to advocate the termination of the hostilities in Vietnam. But *so far as advocacy is concerned*, I see no constitutional way of putting restraints on them so long as we have the First Amendment.

Harassing them by public hearings and by probing into their beliefs and attitudes, pillorying them for their minority views by exposing them to the hearings under the Act—these actions will have the same "chilling" effect as the Court held the trial in *Dombrowski* would have had.

First Amendment values ride on what we do today. If government can investigate ideas, beliefs, and advocacy at the left end of the spectrum, I see no reason why it may not investigate at any other part of the spectrum. Yet as I read the Constitution, one of its essential purposes was to take government off the backs of people and keep it off. There is the line between action on the one hand and ideas, beliefs, and advocacy on the other. The former is a legitimate sphere for legislation. Ideas, beliefs, and advocacy are beyond the reach of committees, agencies, Congress, and the courts.

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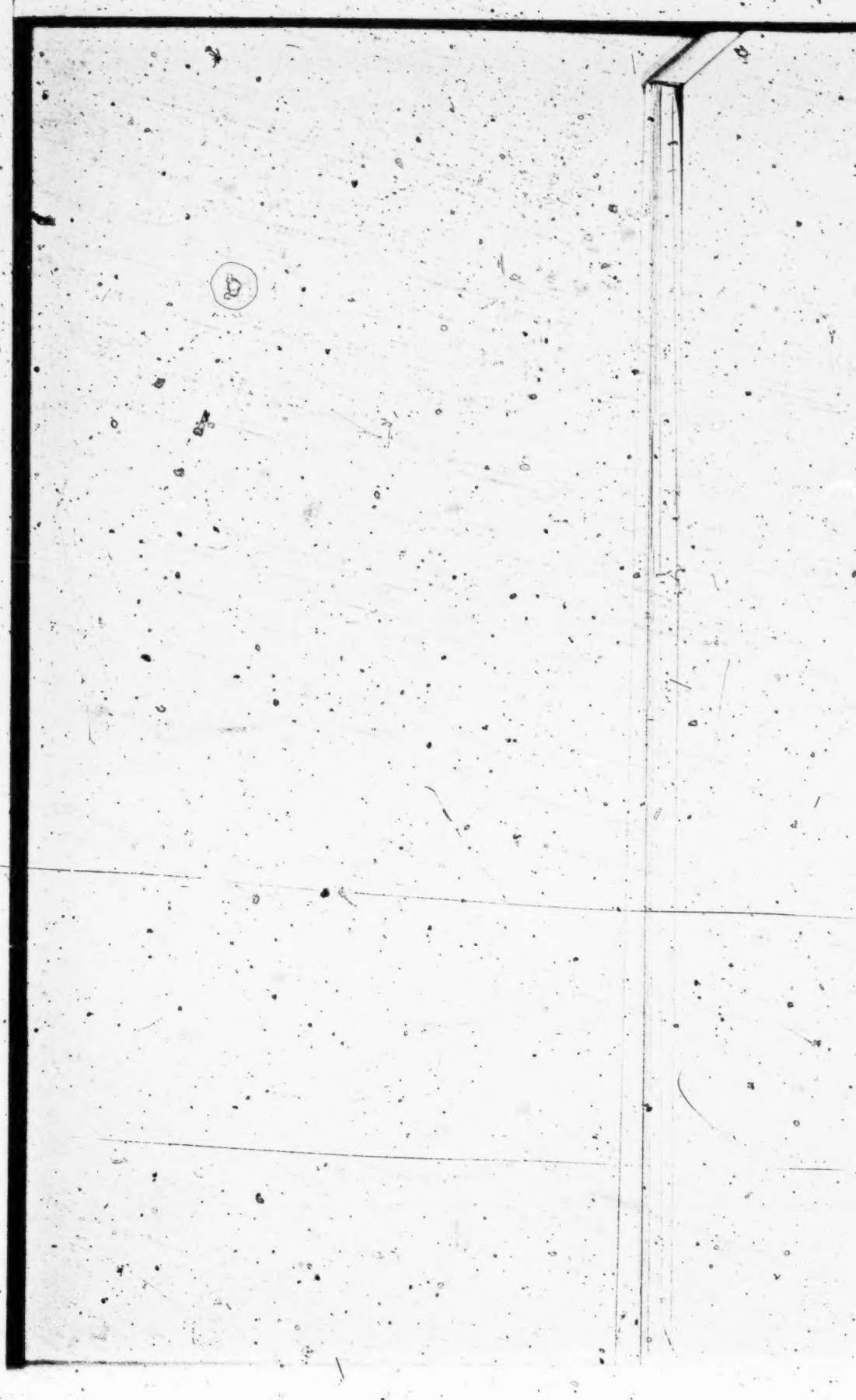
[3] No such question was presented in *American Committee* v. *SACB*, 380 U. S. 503, and *Veterans of the Abraham Lincoln Brigade*, 380 U. S. 513. Those cases were reviews of the actions of the Board and did not involve the present question, whether it is necessary to exhaust administrative remedies as a prerequisite to challenging the Act as being invalid on its face.

[4] On the vices of parallelism see *United States* v. *Lattimore*, 127 F. Supp. 405 (D. C. D. C.), aff'd by equally divided Court, 232 F. 2d 334 (C. A. D. C. Cir. *en banc*).



MR. JUSTICE BLACK and I adhere to the views we expressed in the other cases we have had under this Act (see, *e. g.*, *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1; *Aptheker* v. *Secretary of State*, 378 U. S. 500; *American Committee* v. *Subversive Activities Control Board*, 380 U. S. 503; *Brigade Veterans* v. *Subversive Activities Control Board*, 380 U. S. 513) and would reverse the judgment below.